SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1059

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

vs.

LONG ISLAND LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Eastern District of New York

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Statement under rule XIII

This injunction action was commenced by complaint filed on December 19, 1944.

The parties are set forth in the above caption.

The motion of the plaintiff for a preliminary injunction was made before District Judge Harold M. Kennedy on December 19, 20, and 21, 1944.

No questions were referred to a commissioner, master or referee.

The order denying the preliminary injunction, which is the order appealed from, was after hearing and argument by counsel for the parties entered on December 21, 1944.

The appeal was taken on December 21, 1944.

2 In United States District Court

[Title omitted.]

Complaint for injunction

1. The Plaintiff, Securities and Exchange Commission (hereinafter referred to as the "Commission"), is an agency and instrumentality of the United States Government, created by Section 4 of the Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15 U. S. C., sec. 78a, et seq.), and is charged, among other things, with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., sec. 79a et seq., hereinafter referred to as the "Act"). The Act provides a comprehensive system for the regulation of the business of public utility holding companies, and the financial and corporate affairs of such companies and their subsidiaries, in accordance with the standards prescribed therein by Congress for the protection of the public, investors and consumers.

2. Long Island Lighting Company is a public utility holding company within the meaning of Section 2 (a) (7) (A) of the Act. It is a corporation organized under the laws of the State of New York, and has its principal place of business in Mineola, New York.

3. On November 7, 1935, Long Island Lighting Company filed

an application with the Commission for exemption from the Act pursuant to Section 3 (a) (1) thereof which, in substance, provides exemptions from the Act for predominantly intrastate holding companies "unless and except insofar as it (the Commission) finds the exemption detrimental to the public interest or the interest of investors or consumers". On May 27, 1936, the Commission
3 entered its findings and opinion and order granting said application. In its findings and opinion accompanying its order of March 27, 1936, the Commission stated:

"Section 3 (c) provides that the Commission shall revoke such order whenever it shall find that the circumstances which gave rise to its issuance no longer exist. The provisions of Section 1 (c) and 3 (d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing" (1 S. E. C. 345, 346 (1936)).

4. On November 4, 1944, a petition was filed with the Commission by a protective committee representing public holders of shares of the preferred stock of Long Island Lighting Company, seeking a reopening of the above proceedings under Section 3 (a). Said petition represented that since the date of the Commission's order of March 27, 1936, arrears had accumulated on the preferred stock of Long Island Lighting Company in the amount of more than $10,000,000; that the company was endeavoring to effectuate a recapitalization plan unfair to the preferred stockholders; and that the activities of the company in various respects burden interstate commerce and the means and instrumentalities of interstate commerce. The Commission entered an order on November 10, 1944 directing that a hearing be held pursuant to Sections 3 (a) and 3 (c) and 20 (a) of the Act, to determine whether the exemption of Long Island Lighting Company from the provisions of the Act is detrimental to the public interest or the interest of investors or consumers, and whether the Commission's order of March 27, 1936 should be revoked or in any wise amended or modified.

4 5. The Commission entered an order on November 21, 1944, instituting a proceeding under Section 2 (a) (7) (B) of the Act to determine whether Ellis L. Phillips, Empire Power Corporation, a New York corporation, Eastern Seaboard Securities Corporation, a Delaware corporation, and Lauridel Corporation, a Delaware corporation, or any one or more of them, directly or indirectly, exercise (either alone or pursuant to an understand-

ing with one or more other persons) such a controlling influence over the management or policies of Long Island Lighting Company as to make it necessary or appropriate for the public interest or for the protection of investors or consumers, that they, or any one or more of them, be subject to the obligations, duties and liabilities imposed in the Act, upon holding companies. By a subsequent order dated December 9, 1944, Delaware Olmsted Company, a Delaware corporation, was named an additional party respondent in said proceedings under Section 2 (a) (7) (B) of the Act. The said proceedings pursuant to Section 3 (a) of the Act and the proceedings pursuant to Section 2 (a) (7) (B) of the Act were consolidated by Commission order dated November 22, 1944, and the hearing in said consolidated proceedings was therein ordered to be convened on December 19, 1944 at ten o'clock in the forenoon, E. W. T., at the offices of the Commission in Philadelphia, Pennsylvania.

6. If the Commission should determine in the course of said proceedings pursuant to Section 3 (a) of the Act that the exemption granted to Long Island Lighting Company and the Commission's order of March 27, 1936 should be revoked or appropriately modified, or if it should be determined by the Commission in the course of said Section 2 (a) (7) (B) proceedings that any one or more of the respondents therein exercise such a controlling influence with respect to Long Island Lighting Company, a consequence would be that all significant financial transactions of Long Island Lighting Company, including such matters as the promulgation and effectuation of recapitalization plans and the issuance of securities, would be subject to the Commission's jurisdiction under the applicable standards of the Act.

7. Long Island Lighting Company has proposed a plan of recapitalization, readjusting certain of the rights of its preferred and common stockholders. In an opinion on the plan dated July 27, 1944, the Public Service Commission of the State of New York referred to numerous respects in which the plan was unfair to security holders and deficient in regard to the public interest. Said opinion further stated:

"It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?

"The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather

summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944, for at least eleven-sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly
6 claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years."

8. On December 15, 1944, said Public Service Commission entered an order authorizing the transactions necessary to the consummation of said plan. Two of the five members of the said Public Service Commission declined to vote on the entry of this order of that Commission on the ground that the aforesaid proceedings under the Public Utility Holding Company Act of 1935 concerning Long Island Lighting Company were pending before the Securities and Exchange Commission, and at a crucial stage.

9. There is serious doubt whether the said plan of recapitalization of the Long Island Lighting Company is fair and equitable to the persons affected thereby, and whether if it were presented to the Commission it would be found to meet the standards of the Act prescribed by Congress for the protection of investors. It is also doubtful, because of the unsatisfactory capitalization structure of the company, if the said plan were put into effect, that the plan could be found by the Commission to be in the public interest and for the interests of investors or consumers.

10. Long Island Lighting Company is taking steps to consummate the plan and to put it into effect.

11. In the event the above-described proceedings pursuant to Sections 3 (a) or 2 (a) (7) (B) of the Act were to result in subjecting Long Island Lighting Company to the provisions of
7 Section 11 of the Act, it is probable that a reorganization of the company on a fair and equitable basis, substantially

at variance with the terms and conditions of the present plan, and with due regard to the public interest and the interests of investors and consumers, would be ordered by the Commission pursuant to Section 11 (b) (2) of the Act.

12. The outstanding capital stocks of Long Island Lighting Company are widely distributed among more than 10,000 public investors in many states, and such stocks are traded on a national securities exchange and otherwise. The steps involved in the consummation of the plan of Long Island Lighting Company include the surrender to the company or its transfer agent of certificates representing such shares of stock for overprinting with a legend and for new certificates representing the rights to be accorded the holders thereof under said plan.

13. The taking of the further steps to consummate the plan as described in the preceding paragraph will tend to induce trading in securities on the basis of said plan being an accomplished fact without disclosure of the fact that proceedings under the Act may require a radically different plan and may require determination of the fairness and equity of any new plan with reference to the relative rights of security holders as they existed prior to the consummation of the present plan. The result will be confusion to security holders as well as substantial difficulties in the discharge by the Commission and the federal courts of their duties with respect to the effectuation of fair and equitable plans of reorganization to comply with Section 11 (b) of the Act.

14. The consummation and effectuation of the plan, or of any steps yet to be taken in respect of the plan, would interfere with the carrying out by the Commission of its public duties
8 under the Act, would be detrimental to the public interest and the interest of investors, and would circumvent the jurisdiction of the Commission under the Act.

Wherefore the Commission respectfully prays:

1. That this Court enter a temporary restraining order and a preliminary and final injunction restraining and enjoining Long Island Lighting Company, its agents, servants, employees, attorneys, and assigns, including its transfer agents, and each of them, from directly or indirectly consummating or carrying out, or taking any action or steps to consummate or carry out or effectuate the said plan, including the making of any request for surrender of certificates representing outstanding shares of capital stock of Long Island Lighting Company, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, until determination of the above-described proceedings now pending before the Commission.

2. That this Court grant such other and further relief as it may deem appropriate in the premises.

DAVID K. KADANE,
Special Counsel,
Public Utilities Division,
HARRY G. SLATER,
SOLOMON FREEDMAN,
Attorneys,
Securities and Exchange Commission.
18th and Locust Streets, Philadelphia 3, Pennsylvania.

[*Duly sworn to by Harry G. Slater; jurat omitted in printing.*]

9 In United States District Court

Order to show cause and temporary restraining order

It appearing to the satisfaction of the Court on the verified Complaint that prima facie the plaintiff is entitled to an order restraining the defendant from taking the action hereinafter described in the restraining clause hereof; and

It further appearing that unless a temporary restraining order is issued forthwith the defendant will do and cause to be done the acts hereinafter described in the restraining clause hereof;

It is ordered that cause shall be shown on December 20th, 1944, at 10:30 a. m., E.W.T., why this Court should not enter a preliminary injunction restraining and enjoining Long Island Lighting Company, its agents, servants, attorneys, and assigns, including its transfer agents, and each of them, from
10 directly or indirectly consummating or carrying out, or taking any steps to consummate or carry out or effectuate its plan of recapitalization, including the making of any request for surrender of certificates representing outstanding shares of capital stock of Long Island Lighting Company, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, until determination of certain proceedings now pending before the Securities and Exchange Commission in respect of Long Island Lighting Company under Section 3 of the Public Utility Holding Company Act of 1935, and in respect of Ellis L. Phillips, Empire Power Corporation, Eastern Seaboard Securities Corporation, Lauridel Corporation, and Delaware Olmsted Company under Section 2 (a) (7) of said Act; and

It is further ordered that pending the hearing and determination of said Complaint for a preliminary injunction, said Long Island Lighting Company, its agents, servants, attorneys, and assigns, including its transfer agents, and each of them, be and

hereby are restrained from taking any of the action described in the preceding paragraph hereof; and

It is further ordered that notice of this Order to Show Cause shall be sufficient if given on or before the 19th day of December, 1944; that a copy of this order together with a copy of the Complaint filed herein, be served on the defendant forthwith, and that this order shall remain in effect until argument on said Order to Show Cause and thence until the further order of this Court.

HAROLD M. KENNEDY,
United States District Judge.

Dated December 19, 1944.

11 In United States District Court

Order

December 21, 1944

Plaintiff having moved herein by order to show cause dated December 19th, 1944 for an order restraining the defendant, its agents, servants, attorneys and assigns, including its transfer agents, and each of them from taking any action to effectuate a certain plan of recapitalization, more fully mentioned and described in the complaint herein, and the court having ordered that during the pendency of the motion and until the determination thereof and the entry of an order thereon the defendant be restrained from effectuating the said plan in the manner described in the complaint, and the motion having duly come on to be heard, and having been argued for the plaintiff by Messrs. Kadane, Slater & Freedman, attorneys for plaintiff, Harry G. Slater, Esq. and Morton E. Yohalem, Esq. of counsel, and by Messrs. Unger and Pollock, attorneys for preferred stockholders, Mr. Pollock of counsel for the plaintiff, in support of the motion, and the
12 court having heard Mr. Harold R. Medina, attorney for the defendant, in opposition thereto, and Mr. William G. Lockwood, attorney for the New York Curb Exchange, having appeared specially on the said motion.

Now on reading and filing the complaint herein, verified December 19th, 1944, in support of the motion, and due deliberation having been had, and the court having under date of December 21st, 1944 rendered its opinion in writing, it is, on motion of Charles G. Blakeslee, Esq., attorney for defendant,

Ordered that the said motion be, and the same hereby is, in all respects denied, and it is

Further ordered that the temporary restraining clause contained in the order to show cause herein, bearing date December 19th, 1944, be, and the same hereby is, vacated, set aside and annulled.

HAROLD M. KENNEDY,
United States District Judge.

13 In the District Court of the United States for the Eastern District of New York

Civil Action, Index No. 4606

[Same title.]

Brooklyn, New York, December 21st, 1944.

Appearances: Kadane, Slater & Freedman, Esqs., Attorneys for Plaintiff; Messrs. Slater and Yohalem, of Counsel, for the Motion. Unger & Pollock, Esqs., Attorneys for Preferred Stockholders; Mr. Pollock, of Counsel, for the Motion. Charles G. Blakeslee, Esq., Harold R. Medina, Esq., Attorneys for Defendant, Opposed. William G. Lockwood, Esq., Attorney for New York Curb Exchange, appearing specially.

Opinion

KENNEDY, D. J.

The plaintiff, Securities and Exchange Commission, applies for a temporary injunction restraining the defendant, its agents, servants and employees from "directly or indirectly consummating or carrying out, or taking any action or steps to consummate
14 or carry out or effectuate" a certain plan of reorganization readjusting the rights of its preferred and common stockholders.

The prayer for relief plainly states that the temporary injunction sought here and the final injunction sought in the action are identical.

The plaintiff, which was created by Section 4 of the Securities and Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15, U. S. C., Section 78, et seq.) is charged with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, et seq.).

On November 7, 1935, the Long Island Lighting Company, the defendant here, applied to the plaintiff under Section 3 (a) (1) for exemption from the act. On March 27, 1936, the Commission granted such exemption, reserving, however, in its findings and opinion the right to amend its order if it should find that the ex-

emption is detrimental to the public interest because of the defendant's activity, or that of any subsidiary company, or because a burden was placed upon interstate commerce.

The motion is based upon the complaint, and the complaint alone, and although the defendant appeared by attorney, it submitted no papers in opposition.

However, extended argument was had, and counsel supplied me with a number of facts not in dispute which underlie the application.

The preferred stock of the company has never had voting rights. Arrears have been piling up on this preferred stock, and since March 27, 1936, the date when the defendant was exempted from the provisions of the Public Utility Holding Company Act these arrears aggregate more than ten million dollars (Complaint, p. 4).

Evidently there has been desire on the part of everybody to make some adjustment in the corporate structure.

On February 29, 1944, the defendant submitted to the Public Service Commission of the State of New York a plan of readjustment, which, on April 25, 1944, its stockholders approved. This plan apparently was never acceptable to some of the preferred stockholders, who undoubtedly, in view of the increasing arrears, desired much greater control than the common stockholders were willing to give them. On July 27, 1944, the Public Service Commission of the State of New York acknowledged that it was helpless to compel the company to readjust its voting rights in accord with what could be considered "sound finance and equitable considerations" (Complaint, p. 7).

Nevertheless the defendant continued its effort to secure approval of this plan from the Public Service Commission. Thereupon, and on November 4, 1944, a protective committee of preferred stockholders applied to the plaintiff. This committee asked that proceedings under Section 3 (a) of the Act be reopened, and on November 10, 1944, the Commission directed that a hearing be held to determine whether the exemption of the defendant was detrimental to the public interest and whether its order of March 27, 1936 should be revoked or amended (Complaint p. 4). Still later, and on November 21, 1944, the plaintiff on its own motion instituted a proceeding under Section 2 (a) (VII) (B) of the Act to determine whether certain persons and corporations exert a controlling influence on the policy of the defendant, and whether they should not be subject to the obligations of the statute. On November 22, 1944, the two proceedings then pending were consolidated and a hearing ordered on November 27, 1944. This hearing was adjourned (not on the application of the defendant) to December 19, 1944.

In the meantime, and on December 14, 1944, the Public Service Commission of the State of New York approved the plan of reorganization, and an order effectuating the plan was filed on December 16, 1944. It was conceded on the argument by the plaintiff's attorneys that on the date last mentioned the
16 rights of the stockholders under the corporate structure theretofore existing came to an end under New York State law. The attorney for the New York Curb Exchange, appearing specially at the argument, stated to the court that trading in the old securities ceased on December 16, 1944 and transactions in the company's stock as modified by the reorganization commenced on December 18, 1944. In the early afternoon of December 19, 1944 there was submitted to me for signature an order to show cause containing an ex parte restraining clause as broad as the prayer for relief in the complaint itself. The motion was returnable on December 20, 1944. As will more fully appear later I had doubts about my power to grant even a temporary restraining order to the plaintiff. Nevertheless I did so.

From the argument of counsel for the plaintiff I conclude that specific jurisdiction to grant the injunction sought by the motion is not to be found in the act itself. Certainly the defendant had violated no order, rule or regulation of the plaintiff; during all of the times mentioned it was specifically exempt from the jurisdiction of the Commission. Defendant's proceedings in the Public Service Commission were taken openly, and apparently in full compliance with the law of the State of New York and of the administrative body to whose jurisdiction it was subject, namely the Public Service Commission. These proceedings, as indicated, stretched over the period between February 29, 1944 and terminated on December 16, 1944. Nor did the defendant, so far as either the complaint or the argument discloses, flout or ignore any order of the plaintiff with respect to the hearing ordered under Section 3 (a), or 2 (a) (VII) (B) of the act. No such claim was made. The plaintiff urges, however, that during the period between the final hearings in the Public Service Commission (September 27, 1944) and the final approval of the plan (December 14, 1944) the defendant was on notice that proceedings to revoke its exemption had been set in motion.
17 Plaintiff says that these proceedings might result ultimately in bringing the defendant within the jurisdiction of the Commission, and that if this happened the Commission might not approve the reorganization plan. Meanwhile, says the plaintiff, security holders will proceed with exchanges under the reorganization plan "without disclosure of the fact that proceedings under the Act may require a radically different plan" (Complaint p. 13). This in turn may result in confusion to security holders as

well as substantial difficulties to the Commission in the discharge of its duties.

The defendant, among other contentions, urges that to grant even a temporary restraining order here would be to subject the defendant to intolerable difficulty. It has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote.

If, as I have indicated, there is no specific statutory authority for the kind of order which the plaintiff seeks (and perhaps even if there were) it would be incumbent upon the plaintiff under general principles of equity to show that irreparable harm would result from the denial of the temporary injunction, and I use "would" in the sense that more than a bare possibility exists. I cannot say that such a showing has been made. Moreover the plaintiff, without specific statutory authority, is asking that on the bare complaint itself I should determine that it is entitled to all of the final relief which it seeks. Plaintiff's counsel admitted on the argument that in the case at bar there was no distinction between a temporary injunction and a permanent injunction, and I agree that this is so.

Leaving all other considerations out of the matter I doubt seriously that I have any such power as that which the plaintiff invokes.

18 I think plaintiff is really seeking a decision that the courts may, in aid of the statute (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79a, et seq.) restrain corporations not within plaintiff's jurisdiction against the commission of acts that plaintiff could deal with itself, were it later to acquire jurisdiction. Concededly this power has not been conferred upon the courts in terms by the Congress where it would most naturally be looked for; namely, in the statute itself. On the argument plaintiff's counsel seemed to urge that their cause was justiciable, and the relief sought should be granted under general principles of fair dealing—of equity. It is true that federal courts have general equity powers, but only when sitting in cases otherwise within their jurisdiction as defined by Congress (Briggs v. United Shoe Machinery Co., 1915, 239 U. S. 48, 36 S. Ct. 6, 60 L. ed. 138). And so if plaintiff would set the court in motion on principles of equity it must first bring the cause within some of the familiar fields of jurisdiction granted to the courts by the Congress, such as diversity or the existence of a federal question.

I doubt that there could be any diversity here, and certainly it is not plainly set forth in the bill of complaint. Is there a federal question? If so it must lie in the suggestion that plaintiff, a federal agency, seeks to protect itself against acts which might hamper it in the execution of its duty to enforce the statute (Complaint, p. 13). But I believe no federal question arises unless plaintiff's right of action may be said really and substantially to involve a controversy respecting the validity or construction of an act of Congress (Shulthis v. McDougall, 1912, 225 U. S. 561, 569; 32 S. Ct. 704, 706, 56 L. ed. 1205). The bill of complaint here does not disclose that any such controversy exists. Nor was it suggested in the argument that such a controversy exists, and that the granting or withholding of an injunction, either temporary or permanent, would really turn upon the construc-
19 tion or validity of the statute from which plaintiff derives its powers, or for that matter of any other federal enactment.

This reduces the issue to one that is comparatively narrow: under the guise of construing the statute to determine whether the power invoked by the plaintiff may be implied may I take jurisdiction, and then either exercise that power or not, depending upon which way the appeal to discretion lies? It seems to me that if I answer this question in the affirmative, and that if the courts under the guise of construing a statute can give themselves such sweeping power, then they and not Congress are defining jurisdiction. I cannot believe that this sort of "construction" (no matter how salutary the statute, or for that matter how great the specific benefit achieved by a decision in favor of the existence of such power) can take the place of a real controversy over what Congress meant by the words it employed in the statute. This is more like deciding what Congress meant by silence. When appeal is made to general principles of fair dealing and of equity it is understandable that federal courts have at times been unwilling to renounce jurisdiction, and may have done so reluctantly; but as I understand the matter they must. And I do so, without touching questions like the wisdom or fairness of the plan of reorganization here assailed.

Nor do I consider the other questions that it would be necessary to decide in plaintiff's favor in order that the relief it asks might be granted. It was strongly urged that there is no clear showing of irreparable harm here if injunction be withheld; that the plan, having been consummated, cannot be undone, nor its execution halted without creating a chaotic condition in defendant's corporate structure; that the plan was sub judice in the administrative authority of the state for eight months before the preferred stockholders invoked plaintiff's protection, and almost four

months after the Public Service Commission had in terms
20 suggested this course to them (Complaint p. 7). Moreover it does not clearly appear whether these preferred stockholders have a remedy in the state courts to review the action of the Public Service Commission—a remedy that they failed to invoke. I acknowledge that this last consideration, the effect of failure to exhaust a possible remedy in tribunals of the state, is not to be charged to plaintiff. But the preferred stockholders appeared on this motion before me and were heard. It was they who set in motion at least a portion of the consolidated proceedings looking to the recapture of jurisdiction by the plaintiff. And were the merits before me I would think it proper to consider whether a temporary injunction here might do violence not only to principles of equity, but to principles of comity also.

It is the power to speak on these matters that I renounce. One consideration remains. I intimated to counsel at the argument that I inclined to hold the views which I here express on the question of power. Indeed I adjourned the argument for several hours after indicating this, in the hope that counsels' research or mine would bring to light some controlling authority on the jurisdictional point. None was found. Counsel for plaintiff, in line with their duty, and no doubt appreciating that the want of a clear precedent injured their own cause, requested that I continue in force the broad ex parte restraining order, while review of any adverse ruling was secured. Since I have reached the conclusion that I am without power to grant the relief which plaintiff asks, and therefore should not have restrained defendant at all, I feel that this course would not be proper even though precedent seems to indicate that I might be justified in following it (Merrimac River Savings Bank against Clay Center, 219 U. S., 527, 55 L. ed. 320; Moscowitz, D. J., in Matter of Realty Associates Securities Corporation, Debtor, No. 45,024, E. D. N. Y., December 1, 1944). I suggested instead to counsel that the length and
21 character of any temporary ex parte restraint could with greater propriety be determined by the reviewing Court.

Motion denied, temporary stay vacated, submit order.

HAROLD M. KENNEDY,
United States District Judge,
Eastern District of New York.

22 In United States District Court

Notice of appeal

SIRS: Notice is hereby given that the Securities and Exchange Commission hereby appeals to the Circuit Court of Appeals for

the Second Circuit from the Order of the United States District Court for the Eastern District of New York, dated December 21, 1944, denying the application of the Securities and Exchange Commission for a temporary injunction, and dissolving a preliminary restraining order of said Court dated December 19, 1944.

Yours, etc.,

ROGER S. FOSTER,
Solicitor,
MORTON E. YOHALEM,
Counsel,
Public Utilities Division,
HARRY G. SLATER,
SOLOMON FREEDMAN,
Attorneys for the Securities and Exchange Commission,
18th and Locust Streets, Philadelphia 3, Pa.

Dated at New York, December 21, 1944.

To the Clerk of this Court.

CHARLES G. BLAKESLEE,
Attorney for Respondent,
225 Broadway, New York, N. Y.

23 In United States District Court

[Title omitted.]

Designation of record

Attorneys for plaintiff hereby designate the following portions of the record and proceedings in the instant case to be the record on appeal:

(1) Complaint for injunction filed December 19, 1944.

(2) Temporary restraining order and order to show cause returnable December 20, 1944, issued December 19, 1944.

(3) Order denying preliminary injunction and dissolving temporary restraining order after hearing, issued December 21, 1944.

(4) Opinion of District Court on order denying preliminary injunction and dissolving temporary restraining order dated December 21, 1944.

24 (5) Notice of appeal by Plaintiff herein filed December 21, 1944.

(6) Designation of record as set forth herein.

DAVID K. KADANE,
HARRY G. SLATER,
Attorneys for Plaintiff.

DECEMBER 27, 1944.

Service of a copy of the foregoing Designation of Record accepted this 27th day, December 1944.

CHARLES G. BLAKESLEE,
Attorney for Defendant.

In United States District Court

Clerk's certificate

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct copy of the papers represented therein and constitutes the record of the said District Court in the above-entitled matter and that the last day to file said record is January 30, 1945.

In testimony whereof, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Eastern District of New York, this 29th day of December 1944, in the year of our Lord, one thousand nine hundred and forty-four, and of the Independence of the said United States, the one hundred and sixty-ninth.

[SEAL]

PERCY G. B. GILKES,
Clerk.

By SIDNEY R. FEUER,
Deputy Clerk.

25 In United States Circuit Court of Appeals for the Second Circuit

No. 233—October Term, 1944

(Argued January 15, 1945—Decided February 23, 1945)

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, APPELLEE

Before HUTCHESON, SIMONS, and CLARK, Circuit Judges

Appeal by the Securities and Exchange Commission from an order of the District Court for the Eastern District of New York denying appellant's motion for an injunction enjoining appellee from carrying out a plan of recapitalization approved by the Public Service Commission of New York. Order Affirmed.

26 Harold R. Medina, Charles G. Blakeslee, Charles E.

Elbert, John J. Donohue, Richard T. Davis, of counsel for appellee.

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On brief as Amici Curiae: Milton Pollack for preferred stockholders. William A. Lockwood for New York Curb Exchange.

Opinion

SIMONS, Circuit Judge:

The appellant sought temporary and permanent injunctions restraining the appellee from consummating a plan for its recapitalization until determination of proceedings pending before the Commission, involving the status of the appellee under the Public Utility Holding Act of 1935, 49 Stat. 803, 15 U. S. C. A. § 79 (a) et seq. The District Court denied the preliminary injunction on the ground that it lacked power to grant the relief sought. A temporary restraining order pending hearing, having been dissolved, a judge of this court granted a temporary restraining order pending hearing on the appeal.

The Commission sought protection by the District Court in the carrying out of duties asserted to devolve upon it under the Public Utility Holding Act, by enjoining the appellee from taking further steps to effectuate a plan of recapitalization, until in an
27 administrative proceeding before it, it was determined whether rights sought to be affected by the plan should be subjected to the reorganization standards of § 11 of the Act. The specific action sought to be enjoined is the overprinting of existing certificates for preferred stock and the issuance of new common stock, and the nature of the relief sought is the preservation of the status quo.

The appellee is a holding company as defined in § 2 (a) (7) of the Act, but exempt from the registration and regulatory provisions of the Act by an order of the Commission dated March 27, 1936. That order is, by its express terms, subject to revocation after hearing and a finding by the Commission that the circumstances which gave rise to its issuance no longer exists. The exemption is authorized by § 3 (a) of the Act and may be revoked in pursuance of § 3 (c).

On November 4, 1944, a petition was filed with the Commission by the preferred stockholders of the appellee, which led to the institution of proceedings by the Commission on November 10, to determine whether the exemption should be in whole or in part

revoked. The stockholders represented that the appellee was endeavoring to effectuate a recapitalization plan unfair to them and had engaged in activities which burdened interstate commerce and the means and instrumentalities of interstate commerce. On November 21, 1944, the Commission instituted a separate proceeding under § 2 (a) (7) (B) of the Act, for the purpose of determining whether certain persons or corporations owning or controlling substantial amounts of outstanding common stock of the appellee, exercised such a controlling influence over its management or policies as to make it necessary, in the public interest and for the protection of investors or consumers, that the appellee be subjected to the obligations, duties, and liabilities imposed by the Act. On November 22 the two proceedings were consolidated and a hearing ordered for December 19, which, for reasons presently appearing, was not held. It is asserted that if it should be
28 determined that the exemption granted to the appellee be revoked or modified, the consequence would be that the promulgation and consummation of the plan of recapitalization would then be subject to the jurisdiction, scrutiny, and approval of the Commission under the applicable standards of the Act.

On December 18, prior to the date set for hearing, it came to the Commission's attention, through the press, that the appellee was undertaking to consummate a plan under New York law without awaiting a determination whether it would be permitted to continue to enjoy its exemption, or whether it would be required to register as a holding company, or be subjected to the supervision of the Commission, and the present proceeding was at once begun to restrain such consummation.

Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to requirements of the Stock Corporation Law and the Public Service Law of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors. Rochester Gas & Electric Corp. *v.* Maltbie, 284 N. Y. 626. The appellee promptly filed its certificate of recapitalization together with the order of approval, in the office of the Secretary of the State of New York, in pursuance of the Stock Corporation Law. The plan became effective upon such filing (General Corporation Law, § 8), the rights of the stockholders under the corporate structure thereupon came to an end, trading in the old stock ceased on the New York Curb Ex-

change on December 16, and trading in the new stock com-
29 menced on December 18. On December 19 the appellee was ordered to show cause why a preliminary and permanent injunction should not be entered restraining it from carrying out the recapitalization plan, and concurrently the temporary restraining order issued. Because of it and the order out of this court compelling further restraint pending hearings on appeal, the appellee says it is now a corporation without stockholders and unable to do any of the things which, by state law, require the approval of stockholders.

The court, without determining whether a case had been made out for equitable relief by a showing of irreparable harm if the injunction should be withheld, and without considering whether state law provided a remedy to the preferred stockholders which they failed to invoke, denied the relief sought solely upon the ground that the Commission was without power, conferred upon it by the Act, to seek, and the court without power, because of limitations upon its jurisdiction, to grant it.

The Commission bases its appeal mainly, if not solely, upon the asserted legal principle that a federal court has power, upon the application of an administrative agency before which an administrative proceeding is pending, to preserve the status quo until such proceeding is concluded. The necessity for the preservation of such status is sought to be demonstrated by argument that if further steps are taken by the appellee to consummate its recapitalization plan, the rights of preferred stockholders will be broken up into new preferred and common shares in distributable form, and it might become impossible to adjust their rights on a basis which would adequately reflect existing equities. Trading in the new common stock would cause intervening equities in the purchasers to arise, and there would be serious doubt that the new stock could once more be separated so as to permit fair treatment to all security holders. In any event, trading in Long Island securities would be upon a misleading basis and there would be substantial diffi-
30 culties in achieving the fair and equitable result contemplated by the Act.

The Commission asserts, however, that it does not rely for its authority to seek relief, upon any specific grant of the statute. It disclaims reliance upon § 18 (*f*) as a basis for the jurisdiction of the court, for that section grants it authority to bring an action in a proper district court of the United States only for acts or practices which constitute or will constitute a violation of the provisions of the Act, or of any rule, regulation, or order thereunder, and it concedes there have been no such violations. It plants itself squarely upon the general equity powers of District Court under § 24 of the Judicial Code which extend, inter alia, to all suits of a

civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to suit. In support of its position it argues that the various branches of the federal government have certain implied and inherent powers which will be exercised, where appropriate, to protect the proper functioning of another branch of the government, that preservation of the status quo pending determination, is a traditional aspect of equity jurisdiction, and that the circumstances of the present case amply warrant its exercise to prevent circumvention of the Commission's jurisdiction under the Holding Company Act. It deems it an unnecessary refinement to determine whether particular cases relied on rest upon the fact that the action is brought by the United States or by an officer thereof authorized to sue, or upon the existence of a federal question, or upon the ground that the case falls within § 24 (8) of the Judicial Code applicable to "all suits and proceeding arising under any law regulating commerce". In seeking injunctive relief the Commission asserts it is asking the court to exercise the same kind of jurisdiction which a federal court would employ to protect its own jurisdiction, and to preserve a status quo pending proceedings before another tribunal.

31 The cases relied upon, however, which sustain the right of a federal equity court to preserve a status quo pending proceedings before it or another tribunal, are mainly those in which restraint is sought to protect a jurisdiction otherwise acquired. Such are the bankruptcy cases, typified by Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., 294 U. S. 648, and equity receivership cases, such as Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. (2) 456 (C. C. A. 2). No case has been cited to us, and none has been found, where a federal court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise.

The Commission leans heavily upon Securities & Exchange Commission v. U. S. Realty and Improvement Co., 310 U. S. 434, as a compelling precedent. There the respondent brought reorganization proceedings under Chapter XI of the Bankruptcy Act. Chapter X also provides for reorganization, but permits participation by the Securities & Exchange Commission in proceedings in the District Court. The Commission was allowed to intervene in the Chapter XI proceeding on the ground that it is charged with the performance of important public duties under Chapter X, which will be thwarted if a debtor may secure adjustment of his debts under Chapter XI. The Court found that the Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X,

but to the prevention, so far as the rules of procedure permit, of interference with their performance through improper resort to Chapter XI proceedings in violation of the public policy of the Act which it is the duty of the court to safeguard. Such permissive rule of procedure was found to be Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by para. 37 of the General Orders in Bankruptcy. By it a party may be permitted to intervene in an action when its claim or
32 defense and the main action have a question of law or fact in common. This provision dispenses with any requirement that the intervenor shall have a direct, personal, or pecuniary interest in the subject of the litigation.

The right to intervene, however, does not imply a right to bring an original suit, Sprunt & Sons v. U. S., 281 U. S. 249, 255; P. & W. Va. Ry. Co. v. U. S., 281 U. S. 479. In the U. S. Realty Company case jurisdiction of the court was originally invoked in the exercise by it of the bankruptcy power conferred upon a court of bankruptcy by §§ 74, 75, and 77 of the Act of March 3, 1933, to which Chapters X and XI have succeeded. Under those sections, if the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located, and it is not necessary to its validity that the proceedings should result in an adjudication of bankruptcy. Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., supra. It is, of course, established doctrine that a federal court, having first acquired jurisdiction of the subject matter, may enjoin parties from proceeding in other courts where the effect of the action would be to defeat or impair the jurisdiction of the federal court, Kline v. Burke Constr. Co., 260 U. S. 226, 229, but we fail to perceive its aid to the Commission, even though it extends to the protection of proceedings before an administrative tribunal.

The subject matter involved in the Commission's proceeding, was a determination whether to take jurisdiction over Long Island. It had previously exempted it. To say that it was seeking to protect a jurisdiction, which once it had renounced and was now undertaking to regain, is a contradiction in terms. The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge. It has no
33 jurisdiction over Long Island to be protected, and may draw such jurisdiction to itself only by a finding, after hearing, that circumstances which gave rise to the exemption, no longer exist, and by the promulgation of an order or revocation. This it has not done, and may never do.

Pennsylvania v. Williams, 294 U. S. 176, is urged upon us as authority for holding that a governmental agency may have judicial aid by a stay of judicial proceedings which would interfere with its administrative functions. There the state intervened in a receivership proceeding in a federal court, praying that federal receivers be required to surrender the assets of a corporation to a state agency for liquidation under state law. The court required the District Court to discharge its receivers and direct them to surrender the property to the state commission which had commenced proceedings for the winding up of the association, under state law. This is again an intervention ancillary to validly acquired jurisdiction over the property of the association. We do not perceive it to be authority for a holding that in this case the court should have interfered with the action of the New York Commission at a time when the appellant was without jurisdiction over Long Island. Moreover, the Williams case points out that it has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of state courts where its exercise would involve control of or interference with the internal affairs of a domestic corporation, and that there are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers, citing Matthews v. Rogers, 284 U. S. 521, 525. This is but another aspect of the doctrine that federal courts will carefully observe constitutional limitations upon their jurisdiction, and avoid unnecessary interference with state action. The principle is illuminated for present purposes by Board of Railroad Commrs. v. Great Northern Ry. Co., 281 U. S. 412, where
34 it was held that under the Interstate Commerce Commission Act the courts have no authority to prevent a carrier, by injunction, from putting into effect allegedly unfair intrastate rates until the Commission has a chance to determine their validity. "A judicial restraint of the enforcement of intrastate state rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created". It was also said that "the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission". It would seem, therefore, that the court in

the present case may not interfere with the domestic affairs of a state corporation seeking reorganization or recapitalization under state law, until by formal action of the Commission it was brought within the jurisdiction of the Act which alone created the Commission, and from which it alone derives authority.

While the Commission does not base its suit for relief upon any express authority conferred upon it by the Act, but rests its case upon the general equity powers of a federal court, it is not without importance that, by the terms of the Act which purport to provide for a comprehensive scheme for control of practices by public utility holding companies and affiliates affected with a national public interest, the Congress conferred upon the Commission in § 18 (a) and § 11 (d), the power to invoke the aid of the courts only to prevent evasions of the Act and non-compliance with the
35 orders of the Commission. There is concededly no power to restrain or discipline holding companies exempt from its provisions. It would seem, therefore, that the guide to statutory construction in the maxim expressio unius exclusio alterius, is applicable. Express powers are generally construed to be in negation of powers not expressly granted, and the application of the maxim here is not such an unwarranted use thereof as it was found to be in the Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., supra, where it required other provisions of law to be ignored.

The appellee was exempted from the provisions of the Public Utility Holding Company Act; it has violated no law; it has disobeyed no order or regulation of the Commission. Finding itself in a critical situation in respect to the maturity of its securities, and in need of some change in its corporate structure, it applied for relief to the only agency authorized to grant it, namely, the Public Service Commission of the State of New York, with the sanction of its stockholders. There is no contention that it acted unlawfully; there is no requirement of law that obliged it to advise the appellant of the proceedings before the New York Commission, or of that body's favorable action upon its application. That its endeavor was precipitous may or may not have been in pursuance of its need—of that we are not advised. The Commission says that it did not overlook the possibility of its issuing a summary order under the residual powers conferred upon it by § 20 (a) of the Act, giving it authority from time to time to issue; amend, and rescind its rules and regulations, but that it seemed to it more consonant with traditional doctrines to rely upon the courts rather than upon an administrative agency itself for interlocutory relief, and advises us again and again that it has been careful not to prejudge the merits of the plan. It asserts, nevertheless, that the basis for its application for equitable relief was the conviction that a very serious ques-

36 tion is presented as to whether the plan conforms to standards of the Act designed to protect the public interest, and alleges that there is serious doubt whether, if presented to the Commission, the plan would be found to meet the standards prescribed by Congress for the protection of the investors. But no question in the collective mind of the Commission can give rise to a justiceable controversy, nor may its pronouncements, policy, or program, save as they have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of others, for the judicial power does not extend to the determination of abstract questions. Ashwander v. Valley Authority, 297 U. S. 288, 324.

The Commission argues that because of the extraordinary complexity of the programs dealt with, and the fact that the holding company device has become so largely a mechanism for circumventing legal restraints, it is especially important that the Act be given a broad and flexible construction; that in view of the public purpose to be served, it would seriously impair or limit its accomplishment if the presently sought remedy were withheld, and that there must be an interplay of functions on the part of both agencies and courts, in preventing the Act from being circumvented or evaded by methods which could not be foreseen and specially provided for. Undoubtedly these broad aspects of the matter must weight heavily with courts of equity, but while courts have upon occasion bridged gaps in the law by construction when compelled by clearly expressed legislative purpose, yet "judicial law-making should always be cautiously employed and should be severely restricted in scope." New England Coal & Coke Co. v. Rutland R. Co., 143 Fed. (2d) 179, 189 (C. C. A. 2).

If it be said that a proceeding for reorganization or recapitalization under state law by an exempt corporation may, for
37 all practical purposes, nullify the power of the Commission to exercise its rights and fulfill its duty to revoke the exemption, it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform it capital structure. It may not submit its plan of reorganization to the Commission because it is not subject to the authority of the Commission, and its exemption may have value to it or to new investors which neither its directors nor stockholders may be willing to surrender. It may not, except at its peril, resort to the remedial provisions of state law, for if it does the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation

without regard to the exigency nor to the effort and expense that may have been expended in formulation. We cannot but conclude that the Congress, either deliberately or by indirection, left unoccupied an area of supervision and control by the Commission. It is neither a novel nor unexpected result. In the difficult task of framing legislation to reach newly sensed evils in a complicated social, economic, and financial organization, the finite intelligence of the Congress may not always foresee all of the situations that may arise which call for supervision and regulation. The classical illustration derives from our endless succession of tax laws, and the distinction which the courts have drawn between tax evasion and tax avoidance. For the former the law provides its own discipline—for the latter, resort must again be had to the Congress.

The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so requests such further stay as may be necessary in that connection. We consider the problem here resolved not free
38 from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in Virginia Ry. v. U. S, 272 U. S. 658, 672, et seq. The presently operative restraining order will be continued until mandate shall have issued.

The order below is affirmed.

Concurring opinion

HUTCHESON, Circuit Judge, Concurring Specially:

I concur in all that is said in Judge Simons' excellent opinion. I think, though, that the short and simple answer to appellant's claim of jurisdiction is to be found in the fact that Section 25 [1] of the Public Utility Holding Company Act, which defines the

[1] Section 25 provides:
"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a court of appeals for the District of Columbia,' approved February 9, 1893 (D. C. Code, Title 18, Sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

jurisdiction of the federal courts with respect to suits
39 brought by the commission does not grant jurisdiction of a suit of this kind. I write this brief concurrence to say so. I think it may not be doubted that this section and Sections 11 (d) (e) (f) and 18 (d) (f), which state the circumstances and the manner in which the commission can apply to the courts for relief, were intended to be, and are, as to jurisdiction, both inclusive and exclusive. A word by word examination of these sections makes it clear that nothing in them authorizes the suit here brought. Indeed, the commission in its brief disclaims them as the jurisdictional basis of the suit. In my view, this disclaimer, in the light of the settled rule of law that a statutory scheme intended to be all inclusive must be treated as exclusive also, settles the controversy against the commission. For it is of the essence of such a scheme that what is not included is excluded.[2] The commission, therefore, in asserting a roving commission to sue for, or as, the United States, In Re: Debs, 158 U. S. 564, finds itself confronted with the difficulty, inherent in efforts to induce a court of special jurisdiction to embark upon the exercise of jurisdiction, vague in its generality, and general in its vagueness. But this is not all. It finds itself confronted with the one of attempting to sue out of the character with which the law has invested it, of invoking a jurisdiction beyond that to which the statute, by especially defining, has limited it. It seems quite clear to me that unless we are now to abandon in favor of notions completely alien to our system of law, the settled doctrines of federal jurisdiction and of statutory construction prevailing here, we must say: that the commission is the creature of statute; that it lives and moves and has its being by statutory authority alone, and only within statutory confines; that the creature may not say to its creator, "Why hast thou created me thus?"; and that the commission may not, therefore, by any kind of mysterious
metempsychosis, become disembodied from, and disen-
40 thralled of, the statute which gives it life, to sue not as creature but as creator, in short, as the United States itself. Because then the statute of its creation does not grant, but in effect denies, the jurisdiction invoked, I am in no doubt that the district judge was right and that his judgment should be affirmed.

Dissenting opinion

CLARK, Circuit Judge (dissenting):

Public Utility Holding Company Act of 1935, § 3 (a), 15 U. S. C. A. § 79c (a), authorizes the Securities and Exchange

[2] Posey v. TVA, 93 F. (2) 726; TVA v. Kluzer, 142 F. (2) 833; Breeding v. TVA, 9 So. (2) 6.

Commission to exempt certain holding companies of a predominantly intrastate character from the provisions of the Act, "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers"; but under § 3 (c), it "shall" revoke the exemption whenever, on its own motion or upon application of a company involved, it "finds that the circumstances which gave rise to the issuance of such order no longer exist." This power and duty of revocation was stressed by the S. E. C. in granting exemption to this
41 defendant in 1936.[3] Just as the S. E. C. was about to proceed to a scheduled hearing of petitions for revocation of the exemption, defendant, assuming to proceed under authority of a hesitant decision of the State Public Service Commission, took precipitous action to put into effect a plan of recapitalization which would change the status of the preferred stockholders—the very matter at issue in the proceedings pending before the S. E. C. That this action, if not restrained, would indubitably scramble the interests of these stockholders, perhaps beyond recall, is obvious; that it is the duty of the S. E. C., upon a finding that the conditions rather strongly indicated prima facie do exist, to attempt to unscramble them notwithstanding any obstacles placed in its way seems equally obvious. This duty is certainly not made less insistent by the Supreme Court's solicitude for the observance of security priorities under this Act, shown once again in Otis & Co. v. S. E. C., S. Ct., Jan. 29, 1945. Nor, indeed is it lessened by the constitutional overtones apparent in that decision and already introduced into this case by the contention of the preferred stockholders before the State Commission, which that Commission did not attempt to resolve.

Hence the need of the preventive protection of equity is great; such scrambling and unscrambling of securities can do hardly any one any real good and may do innocent investors, lacking inside knowledge, quite grievous harm. In fact, the only ones who may gain from the company's actions, outside of those frankly speculating or betting on the outcome, are seemingly the management and the common stockholders, who alone can vote and for whom the management is acting. But these, too,

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[3] Thus, after citing the statutory provision, § 3 (c) supra, it appropriately said: "The provisions of Section 1 (c) and 3 (d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is deterimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing." 1 S. E. C. 346, 346, 1936. Inequitable distribution of voting power was held by the Commission to be a ground for refusing exemption under this section in In re Niagara Hudson Power Corporation, Holding Co. Act of 1935, Release No. 5115, June 20, 1944; cf. Ecker v. Western Pac. R. R. Corp., 318 U. S. 448, 474; Okin v. S. E. C., 2 Cir., 145 F. 2d 913. In the present case the Commission was also acting under § 2 (a) (7) (B), petitions under the two sections being consolidated for a single hearing.

can profit only to the extent that presenting a fait accompli to the S. E. C. may discourage that body from further activity. Its past record of assiduity in protecting the public interest suggests that even the hope of such a consequence may be in vain.

My brothers' opinion tends to give the picture of an
42 orderly proceeding under state supervision rudely interrupted by the attempted interference of a federal agency to vindicate in an academic way a power which it has not invoked and may never wish to utilize. Since the issue below was strictly limited to one of power and jurisdiction alone and the S. E. C. with great circumspection has attempted to avoid prejudging the issues which may later come before it, the weight of the case against the defendant is perhaps unimportant at this stage of the proceedings. But denial of relief has been rested to a considerable extent upon what is concluded to be the vagrant nature of the federal interest herein. Hence I deem it necessary to emphasize how differently this matter appeared to the State Commission itself than as here stated. That Commission's criticism of the defendant for voting huge dividends to the common stockholders in the past and for denying representation to the preferred stockholders, notwithstanding that their dividends were greatly in arrears, its regret at its own lack of power to rectify the situation, and its final vote of only three in favor of what appears hardly more than a washing of its hands of the matter, over the protest of its able chairman and another commissioner deploring action while matters were "in a crucial stage before the Securities and Exchange Commission," amount to an excoriation of the officers and management which I should have thought they would have wished to show undeserved at the earliest opportunity possible. And certainly no better forum could have been offered them than that of the scheduled hearing before the S. E. C. The support which defendant appears to draw from the State Commission's action seems somewhat odd; for that action is almost a direct invitation or appeal to the S. E. C. to afford the relief of the State agency cannot.[4]

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[4] On July 27, 1944, the Commission through Chairman Maltbie rendered an opinion with these significant passages (quoted in the complaint herein):

"It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?

"The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944, for at least eleven sixteenths dollar per share and received $8.25 for 12 shares (brief, p. 11), whereas under the proposed plan each holder of 12 shares is to receive only

43 Again the opinion stresses the difficulty under which an exempted company must operate if it must fear the renewed control of the S. E. C. at any time. I cannot avoid the feeling that practically this is an exaggeration of conditions; in daily life milk producers still seem to operate, notwithstanding numerous city health requirements, we all survive various traffic, police, and other regulations, and light and power companies and their holding parents and grandparents are yet operating, in spite of the ministrations of the S. E. C. But the point is that these provisions are announced by the Congress as a part of a general plan of what it considers wise public policy; and we cannot eliminate them, even if we would like to do so. Whatever this court does, indeed
44 whatever may be the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide—if necessary, in a new proceeding and under another section of the statute—will still exist. There are questions here involved too important not to survive a mere ruling of the court's lack of jurisdiction to interfere at a primary stage of the dispute. In fact, one wonders whether defendant is well advised in seeking to shut off an early adjudication of these important issues, in view of what would seem the well-nigh inevitable consequence of rendering its new securities largely unmarketable during the period of uncertainty.[5]

45 In view, therefore, of the undoubted need of a remedy, I think we should direct our attention to possible ways and

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$5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and as a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration, for the preferred stockholders as they purport to have now, the company could have avoided the nonpayment of preferred dividends for six years."

Another opinion, dated October 17, 1944, and adopted December 14, 1944, with Chairman Maltbie and Commissioner Burritt not voting for the reasons stated in the text, went into the "Inadequate Participation by Preferred Stockholders," the limited steps taken to meet the problem, and the question raised whether it would be better to abandon the plan altogether or accept what was proposed. In deciding upon the latter it said that the proposed plan was a step in the right direction from the standpoint of the consumer and that it did place the company's financial structure upon a more stable basis. Continuing it said: "However, from the standpoint of preferred stockholders, the plan leaves much to be desired. But the Legislature has not given this Commission the power to formulate a new plan or to engraft changes upon the proposed plan and to compel the company to accept the changes. All that we are authorized to do is to approve or to reject the plan proposed by the company. The Legislature has provided a remedy for any stockholder who is dissatisfied with the plan. He may seek an appraisal of his stock and obtain the appraised value thereof upon compliance with the conditions specified in §§ 21 and 38 of the Stock Corporation Law." Obviously this latter remedy is not appropriate to restore or protect the value which the plan has already threatened to destroy.

[5] In the light of this situation, resulting from the provisions of the federal statute itself, the memorandum of the New York Curb Exchange as amicus curiae, suggesting, and apparently objecting, that "the stockholders are in effect frozen and this condition will continue so long as the injunction is in effect," seems surprising. The Exchange ought hardly to take sides in a dispute between classes of investors. But in any event, the Exchange would seem to have some obligation to warn traders of the defects attaching to the new stock even if and when it becomes unfrozen.

means to that end, rather than confine ourselves to discovering objections to the method which the S. E. C. has determined upon. After all, we are agreed upon the need of a temporary stay; the District Court is not very far distant from the offices of the S. E. C. in Philadelphia; and a group of preferred stockholders is already before us as amicus curiae and obviously ready for greater participation if justified in law. I do not think it would be difficult for my brothers—upon finding doubts I do not share as to the procedure actually followed—to find and state a procedure which will accomplish whatever is necessary. And I conceive it a court's duty to do so, particularly in view of the patent admonition of Congress to that effect, in the first section of the Act, where is set forth at length the evils which gave rise to this legislation [6] and the broad public policy intended to be subserved by it. The legislators wisely knew that they could not foresee all the holes which astute counsel might discover in legislation so far-reaching; and so with foresight they stated a broad policy to guide courts in their approach to statutory interpretation. Certainly they could hardly have foreseen a lacuna destructive of the very purposes of
46 specific sections of the Act and resting merely upon the celerity with which a company acts when faced with a call for a hearing before the S. E. C.[7]

Moreover, this very approach was followed in Securities and Exchange Commission v. U. S. Realty & Improvement Co., 310 U. S. 434, which reversed this court's conclusion, In re U. S. Realty & Improvement Co., 2 Cir., 108 F. 2d 794, that nothing could be done about a more serious gap in the Chandler Act dealing with corporate reorganizations. Now, after the event, we seem inclined to discover grounds showing that result predestined and easily distinguishable from our present case. Actually, however, the problem of interpretation there was initially much more difficult than the one here. For there, unlike our case, the fundamental jurisdiction of the S. E. C. to act at all was most doubtful, and there appeared to be also positive prohibitions against the S. E. C.'s right even to raise the question. The Chandler Act, in providing for

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[6] One of these was the squeezing out of preferred investors. See Sen. Rep. No. 621, 74th Cong., 1st Sess., 1935, 26, 58 H. R. Rep. No. 1318, 74th Cong., 1st Sess., 1935, 12; S. E. C. Report on Protective and Reorganization Committees, Part VII, 109–187; Dodd, The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act, 57 Harv. L. Rev. 295; Dodd, Fair and Equitable Recapitalizations, 55 Harv. L. Rev. 780, 796–806, 816; Latty, Fairness—The Focal Point in Preferred Stock Arrearage Elimination, 29 Va. L. Rev. 1, 27–39; Otis & Co. v. S. E. C., S. Ct., Jan. 29, 1945, supra.

[7] Defendant stresses the need of speedy action under the order of the State Commission and points to the provision in the order that it shall report its acceptance within 30 days after service of the order. But that certainly did not require action the next day and three days before the date of the S. E. C. hearing. Moreover, even if the acceptance required was other than formal, and called for immediate execution of the plan, the Commission, which had been delaying action to secure better results, would obviously have granted more time upon request for cause shown.

corporate reorganizations under Chapter X and for arrangements under Chapter XI, had set forth overlapping and in part conflicting provisions without any definite suggestion for their reconciliation. Accordingly the Realty Company sought the protection of Chapter XI (wherein the S. E. C. had no rights or duties of any kind), and nothing in express terms negatived its right so to proceed. This initial question of bankruptcy jurisdiction under the statute was the one which proved most difficult throughout the proceedings; out of a total of twelve judges who heard the case at different stages, six were of the view that the company's
47 right to petition only for an arrangement could not be denied. The eventual denial of that right had to rest, therefore, upon an interpretation of the purposes of the Chandler Act and an exposition of how these would be frustrated by the contrary holding. As to the S. E. C., its only standing, by the terms of the statute itself, was to report upon a plan in a Chapter X proceeding, under certain conditions and with a right of intervention in such a proceeding, but with an express prohibition against appeal, § 208, 11 U. S. C. A. § 608, which suggested a lack of status beyond the limited one expressed. The District Court, however, had allowed the S. E. C. to intervene to protect the public interest involved; and while this part of the court's judgment was reversed by this court, 108 F. 2d 794, 797–799, it was approved by the Supreme Court as a discretionary ruling under F. R. C. P. 24 (b), thus establishing the standing of the S. E. C. to litigate in support of its public responsibilities.[6]

48 In our present case the jurisdiction of the S. E. C. to act eventually on the issues presented to it for hearing is beyond dispute under the statute itself; and its duty to appear as a litigant to enforce its orders—eventually—is likewise clear under § 18 (f), and cf. §§ 11 (d) (f), 25. The real issue, as developed in

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[6] The opinion suggests that recognition of the S. E. C.'s right to intervene under F. R. C. P. 24 does not support its right to sue directly. It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486, as follows: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it.*" [Italics added.] So the reference in the U. S. Realty case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing Commonwealth of Pennsylvania v. Williams, 294 U. S. 176, 66 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See Commercial Cable Staffs' Ass'n v. Lehman, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, Nature of Permissive Intervention under Rule 24b, 3 Fed. Rules Serv. 704; Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 50 Yale L. J. 65.

the opinion herewith, is whether or not this action is premature. (Of course, as a practical matter, action must be taken now to be really effective.) This is demonstrated by the emphasis in the opinion upon an existing jurisdiction of the court as ground for distinguishing cases such as Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. R. Co., 294 U. S. 648, Commonwealth of Pennsylvania v. Williams, 294 U. S. 176, 96 A. L. R. 1166, and Graselli Chemical Co. v. Aetna Explosives Co., 2 Cir., 252 F. 456. But for my part these cases are authority for the S. E. C. here because its jurisdiction, given it by statute, is being exercised to the fullest extent that is presently appropriate. It has taken jurisdiction of the petitions and ordered a hearing with notice, just as it had committed itself to do on its original grant of exemption. And its jurisdiction, thus properly accepted, is now being flouted as directly as was federal power in the cited cases, or in S. E. C. v. U. S. Realty & Improvement Co., supra, where, as we have seen, jurisdiction for the S. E. C. was much more difficult to discover, or In re Debs, 158 U. S. 564, which was a still broader assertion of federal power and duty.[9] It seems to me that
49 this case is an appropriate vehicle for vindication of an important federal right, brought in the proper federal court within the express language of general federal jurisdiction, 28 U. S. C. A. § 41 (1).[10]

But there seems to be a thought that the S. E. C. should first have taken some affirmative action which it could then ask the court to enforce under § 18 (f) of the Act. The reasons why the S. E. C. did not itself pass an order of injunction and then ask its enforcement are, as it states, that it wished to proceed with due circumspection and without projudgment of the case. Further

[9] Board of Railroad Commissioners of North Dakota v. Great Northern Ry. Co., 281 U. S. 412, so far as it goes, is also a direct authority. There it was held that intrastate railroad rates established by a state commission would not be set aside because of the pendency of proceedings before the Interstate Commerce Commission *at the suit of the carriers*. The Court says significantly, 281 U. S. at page 430: "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

[10] As the S. E. C. urges, it seems an overrefinement, suggesting an unnecessary limitation upon the general broad power of federal courts to protect federal jurisdiction as established by Congress, to place jurisdiction here entirely upon the terms of a single specific statutory enactment and thus circumscribe it by what is there expressed. It seems to me that the S. E. C. should be held entitled to sue here as an officer of the United States enforcing a public right under the laws of the United States. But if it is necessary to look to new grants of power, I suggest that §§ 18 (f) and 25 of the Act do chart the course, and that it is not sufficient to say that they apply only after definite orders of the S. E. C. and for violations thereof. As developed later in the text, it would seem that what the S. E. C. did amounted in substance to a determination that temporary restraint was in order. And rights and duties under the Act were, therefore, definitely threatened, so as to make these statutes applicable if a limited source of jurisdiction is considered thus requisite. Moreover, if there is doubt whether or not the necessary formalities have been completed by the S. E. C., the case should be held, as stated below, until we are sure the have been completed.

analysis, I believe, will show that it has done all it should properly have done at this stage of the proceedings. It could hardly issue anything like a permanent injunction without due notice and a hearing; this, or its full equivalent, it was proceeding to consider at the appropriate time, and it should be protected against the prejudice to its proper adjudication of the issues which is offered by the hasty action of the respondent in those proceedings
50 before it. If, on the other hand, it should have issued some formal order of temporary restraint—without full hearing, for which time was lacking—mail service from Philadelphia is only overnight and such order can reach the District Court long before our mandate goes down. But in reality what will that add to the steps already taken by the Commission in first ordering a hearing and later in directing its General Solicitor to institute this action and press it for the safeguarding of the hearing as ordered? I assume we are not prepared to question the authorization of the Solicitor to act in the premises; if we are, the order of authorization will hardly be slow in arriving. All these seem to me only formalities, easily satisfied if not already completed, to justify the position of the S. E. C.; if it can come to the federal courts after a hearing on December 19 to protect its jurisdiction, it should be entitled to come to us before that date to protect a threat against the fairness of its hearing to determine the exercise of that jurisdiction, and the prejudice resulting from a coup d'etat by the corporation most involved.

Finally, if, notwithstanding these years of operation and the numerous court proceedings where it actually has been heard in protection of the public interest, the S. E. C. is found to have not only no duty, but no right, to act in the present situation, then it seems to me the preferred stockholders who are directly threatened with injury have a clear right to ask the court for relief. I should hold that they had such right under the implications of the Act itself, just as has been held with respect to other acts administered by the S. E. C., Baird v. Franklin, 2 Cir., 141 F. 2d 238, 244, 245, certiorari denied 65 S. Ct. 38; Charles Hughes & Co. v. S. E. C., 2 Cir., 139 F. 2d 434, 437, 438, certiorari denied 64 S. Ct. 781; Goldstein v. Groesbeck, 2 Cir., 142 F. 2d 422, 427, certiorari denied Groesbeck v. Goldstein, 65 S. Ct. 36; but even if they
51 must show diverse citizenship, as well as a federal right, there are undoubtedly persons who can fulfill all such requirements among the group appearing before us as Amicus curiae. At least the case should be held below to give them the opportunity to appear as plaintiffs. Cf. Hackner v. Guaranty Trust Co. of New York, 2 Cir., 117 F. 2d 95, 98, certiorari denied 313 U. S. 559.

52 In United States Circuit Court of Appeals
for the Second Circuit

No. 19660

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Notice of, and motion for, extension of presently operative restraining order

Filed March 7, 1945

To CHARLES G. BLAKESLEE, Esq.
225 Brodway, New York, N. Y.
HAROLD R. MEDINA, Esq.
165 Broadway, New York, N. Y.

Please take notice that, upon the annexed affidavit of Theodore L. Thau, verified March 7, 1945, the undersigned is this day filing with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, for presentation to Circuit Judges Hutcheson, Simons, and Clark, the motion set forth below.

Motion

Appellant, Securities and Exchange Commission, for the reasons set forth in the annexed affidavit, moves the Court, in the alternative, for an order either—

(a) Extending the presently operative restraining order
53 heretofore granted to and including final disposition of this case by the Supreme Court of the United States upon a petition for writ of certiorari proposed to be filed on behalf of the Commission, provided that the Commission shall file its said petition within fifteen days of the disposition of this motion by this Court; or

(b) Extending the presently operative restraining order heretofore granted by this Court to and including the date of a determination by the Supreme Court of the United States, or a Justice thereof, either granting or refusing to grant a temporary injunction during the pendency before the Supreme Court of said

petition for a writ of certiorari, upon condition that the Commission shall make application therefor to the Supreme Court, or a Justice thereof, upon notice to appellee, within five days of the disposition of this motion by this Court;

such extension, upon either alternative, not to delay the entry of such order of affirmance by this Court as may be necessary as a condition precedent to the filing of a petition for a writ of certiorari. Appellant further prays for such other and further relief as may be appropriate.

ROGER S. FOSTER,
Roger S. Foster, *Solicitor*,
Counsel for the Securities and Exchange Commission,
18th and Locust Streets, Philadelphia 3, Pa.

Dated: Philadelphia, Pa., March 7, 1945.

54 In United States Circuit Court of Appeals

[Title omitted.]

Affidavit of Theodore L. Thau

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Theodore L. Thau, being duly sworn, deposes and says:

1. He is an attorney for the Securities and Exchange Commission, plaintiff-appellant herein.

2. This is an appeal from a judgment of the United States District Court for the Eastern District of New York, entered December 21, 1944, by the United States District Court for the Eastern District of New York, which denied, for lack of jurisdiction, the Commission's motion for a preliminary injunction restraining the defendant-appellee, Long Island Lighting Company, from consummating its plan of recapitalization until the outcome of proceedings now pending before the Commission to determine whether Long Island Lighting Company and its said plan of recapitalization are subject to the jurisdiction of the Commission under the provisions of the Public Utility Holding Company Act of 1935.

55 3. On December 21, 1944, a temporary restraining order was issued by Judge Augustus N. Band, of the United States Circuit Court of Appeals for the Second Circuit, which provided that

"• • • pending the hearing of this appeal or the further order of this Court, the respondent and its attorneys, officers, employees

and agents, including its transfer agents, and each of them, be and they hereby are enjoined and restrained from directly or indirectly consummating or carrying out, or taking any steps to consummate or to carry out or effectuate its plan of recapitalization, including the making of any requests for surrender of certificates representing the outstanding shares of capital stock of Long Island Lighting Company, the over-printing of any legend on such certificates, or the issue or delivery of any certificates in exchange, and thence until the further order of this Court. * * *"

4. On February 23, 1945, the United States Circuit Court of Appeals for the Second Circuit handed down a decision, one judge dissenting, affirming the judgment of the District Court. The decision of this Court provided that "the presently operative restraining order will be continued until mandate shall have issued" for the following stated reasons:

"The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so request such further stay as may be necessary in that connection. We consider the problem here resolved not free from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in Virginia Ry. v. U. S., 272 U. S. 658, 672, et seq.

5. The Commission has determined to petition the Supreme Court of the United States for a writ of certiorari
56 from the decision and judgment of this Court, and is advised that the Solicitor General of the United States has determined to present said petition on behalf of the Commission. The Commission is now diligently preparing its petition for a writ of certiorari and proposes to file said petition with the Supreme Court as promptly as possible after the entry of this Court's order.

6. The extension of the temporary restraining order requested in the accompanying motion is requested for the following reasons:

(a) Unless said restraining order is continued in effect, the Company, which, we understand, opposes this motion, will proceed to consummate its proposed plan of recapitalization in the manner sought to be enjoined by the Commission's complaint.

(b) Should said plan be consummated by the Company all proceedings in the Supreme Court upon the proposed petition for a writ of certiorari may well be rendered moot.

(c) Should said proceedings in the Supreme Court be rendered moot by consummation of the Company's plan of recapitalization, the Commission will be deprived of its right to seek review by the Supreme Court of the decision by this Court of a question which

is of importance in the administration of the Public Utility Holding Company Act of 1935, and which the opinion of the majority of this Court characterized as a question "not free from doubt."

7. The reason for presenting this motion in the alternative is that in the event this Court should deny the further stay we desire to present an application for the same relief to the Supreme
57 Court or a Justice thereof. The Commission has heretofore refrained from so doing because it is advised that it is regarded as preferable practice to present such motions to the Circuit Court of Appeals in the first instance, and to make application to a Justice of the Supreme Court only if the Circuit Court of Appeals declines to grant a stay. Thus, even if this Court should determine not to extend the presently operative restraining order until the final outcome of proceedings in the Supreme Court, it is important, in order to prevent this case from becoming moot, that this Court grant a stay until the Supreme Court or a Justice thereof has had an opportunity to hear and determine a motion by the Commission for further stay pending proceedings before that Court. In this connection it is the Commission's understanding that it is usual for the Justice of the Supreme Court to whom such a motion is presented to submit the motion, where time permits, to the full Court at conference, and it would therefore be important that any further stay which this Court might grant should at least extend to and including a decision by the Supreme Court on the question of extending such stay throughout the proceedings before that Court upon the petition for a writ of certiorari.

8. While the Commission's counsel understand that Long Island will oppose this and any other motion which the Commission may make for an extension of the restraining order, we are not advised of the grounds of such opposition except as previously disclosed in briefs and argument before this Court. Apparently the grounds of opposition relate to the consideration of the merits of the Commission's prayer for injunction which the District Court declined to pass upon because of its belief that it lacked jurisdiction. In its brief and argument before this Court appellee conceded that these discretionary considerations were not in issue but referred to them only because of their alleged bearing upon the issue as to the jurisdiction of the District Court (appellee's brief, p. 23). Neverthe-
less, the Commission's answer to these arguments will be set
58 forth insofar as they can be anticipated. Such objections appear to be that extension of the temporary restraining order would (a) prevent Long Island from pursuing certain corporate functions, and (b) prevent Long Island's stockholders from dealing freely with their securities in the public markets.

9. The Commission's answers to the foregoing objections are as follows:

(a) With respect to the objection that an extension of the temporary restraining order would prevent Long Island from pursuing certain corporate functions, it is clear that the business of Long Island, i. e., the rendering of gas and electric service, is in no way impeded by the presently operative restraining order. As we understand this objection, therefore, it is that Long Island may be impeded in the election of directors and in certain extraordinary financial transactions. As to this, it should first be stated that the complaint filed by the Commission is directed to ensuring Long Island's preferred stockholders fair and equitable treatment in any proposed plan of recapitalization, and since the rights and assets of the corporation as such are not involved, Long Island is in essence occupying the position of a mere stake holder. Moreover, insofar as there is forthcoming an annual meeting for the election of directors, it is submitted that no detriment can result from postponing this election; Long Island has not contended that it would be detrimental to it if the existing management should hold over pending the outcome of this litigation.

59 Long Island has contended that a serious consequence of the lack of voting stockholders is its inability under New York law to mortgage its assets. With respect to this point it should be noted that the Company's first mortgage debt was refunded in 1942 and does not mature until 1972. That debt presently comprises (1) ($30,150,000 3¼% First Mortgage Bonds which are a lien not only upon the existing physical properties of the Company but also upon any after-acquired properties and upon the Company's holdings of common stocks of its direct public utility subsidiary companies; and (2) $8,178,000 principal amount of 3¾% Debentures which do not mature until May 1, 1956. Contrary to the statement in the opinion of the majority of this Court, the Company when it promulgated the plan was not in a "critical situation in respect to the maturity of its securities" since its securities do not mature for many years. Moreover, with respect to the further statement in the opinion of the majority of this Court that Long Island "was in need of some change in its corporate structure," it may be observed that the arrears on Long Island's preferred stocks had been accumulating since 1938 and the proposed plan was not submitted to the Public Service Commission of the State of New York until February 29, 1944. Finally, any proposed issues of additional mortgage bonds or any refunding of outstanding mortgage bonds would require the institution of appropriate proceedings of uncertain duration before the Public

Service Commission of the State of New York pursuant to Section 69 of the New York Public Service law before they could be authorized.

It is the Commission's position that the considerations of public interest involved in ensuring fair and equitable treatment of Long Island's public security holders far outweigh any conceivable detriment to the corporate functions of Long Island.

60 (b) In answer to the second objection, it is the Commission's position that security holders will not be seriously affected by a stay in dealing freely with their securities upon the public markets. The Commission is vitally concerned with this problem and, indeed, it was the desire to prevent trading on a basis which might prove misleading, in view of the potential impact of the Public Utility Holding Company Act upon Long Island's plan, that provided a major impetus for the Commission's complaint for equitable relief in this case.

While the New York Curb Exchange determined on its own initiative to suspend trading in the new preferred and common stocks of Long Island on a "when-issued" basis immediately upon advice that a temporary restraining order had been issued by the District Court, the Trading and Exchange Division of the Commission has advised the Curb Exchange and the National Association of Securities Dealers, Inc. (which is a national association of over-the-counter dealers), as well as a number of individual dealers who have made inquiry, that there is nothing to prevent trading in the old preferred or common certificates for whatever interests they now represent, provided adequate disclosure is made of all material facts including the pendency of administrative and judicial proceedings and the possible effect upon the ultimate rights of Long Island's security holders. The Commission is advised that such trading has been carried on in the over-the-counter market, that quotations have appeared in the National Daily Quotation sheets, and that in practice transactions are consummated by delivery of old certificates duly endorsed. The effect of such sales is to transfer whatever

61 changed rights have been vested in holders of the old certificates as a result of the filing of the charter amendment and these rights are transferred subject to the possibility of readjustment in the event that Section 11 of the Holding Company Act is applicable to the plan. It is by no means certain that similar trading cannot be resumed on the Curb while a temporary restraining order is in effect, subject, of course, to the disclosure requirements imposed by the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, which are equally applicable whether a security is traded

on an exchange or on the over-the-counter market. It would seem further that any mechanical obstacles presented by problems of quotations and delivery are not insuperable.

It is the Commission's position that the extension of the restraining order will not deprive Long Island's security holders of adequate recognition in maintaining a market for their shares. At the same time preservation of the restraining order will afford the Commission an opportunity to have determined by the Supreme Court the question whether it can protect the interests of such security holders against a plan challenged as unfair by a substantial group of preferred stockholders and to protect the public interest against any trading in such securities on a misleading basis.

10. The Commission has throughout this proceeding endeavored to act with the utmost dispatch. The record in this case discloses that the Commission first learned of the Company's proposed action to consummate the plan, through the public press, on December 18, 1944. The Commission's complaint was filed in the District Court on December 19. The application for temporary relief was heard by Judge Kennedy, who issued his decision on December 21. That same day the Commission filed its notice of appeal and applied to a single judge of this Court
62 for a temporary restraining order, pending decision by this Court. The Commission's brief was served on Long Island on December 29 and this Court heard oral argument on the first available date.

11. A petition for a writ of certiorari is now in preparation and it is the Commission's intention, in the event that a stay is granted, to comply with the suggested condition as to filing the petition within fifteen days of disposition of this motion, by filing the petition in typewritten form. While the company will be entitled to await service of a printed copy of the petition and also of the printed record as made up under the direction of the Clerk of the Supreme Court, the company will be free to file its answer without waiting for service of said printed copies. Inasmuch as the record in the Supreme Court will consist of the printed record in the court below, together with the opinion and order of this Court, there would be no practical difficulty in following this course. The Commission has available sufficient copies of the record below to meet the requirements of the Supreme Court Rules. Thus, there is no reason to anticipate more than a few weeks' further delay to permit the Supreme Court to determine whether or not it will grant a writ. In the event that the Supreme Court should determine that the case is one deserving review upon a writ of certiorari, there could hardly be a

serious question as to the appropriateness of the stay continuing until the Court has disposed of the matter on the merits and there is every prospect that the matter could be disposed of at the present term of court.

[SEAL] THEODORE L. THAU.
Theodore L. Thau.

Subscribed and sworn to before me this 7th day of March 1945.
AMANDA WELLS,
Notary Public.

63 In United States Circuit Court of Appeals

Decision

NEW YORK, 3/14/45.

I am directed by Judges Hutcheson and Simons to enter an order granting alternative (b) of this motion for a stay pending application to the Supreme Court for such relief. I concur in this as far as it goes, although in my judgment the public importance of the question, and the attendant circumstances made more desirable the grant of alternative (a) of the motion—or a stay pending application for, and disposition of, writ of certiorari.

CHARLES E. CLARK,
U. S. C. J.

[File endorsement omitted.]

64 In United States Circuit Court of Appeals

[Title omitted.]

Affidavit in opposition to motion for extension of temporary restraining order

Filed March 8, 1945

STATE OF NEW YORK,
County of New York, ss:

Charles G. Blakeslee, being duly sworn, deposes and says:

I am general counsel for Long Island Lighting Company and its attorney in this proceeding.

The Company opposed plaintiff's application to continue the stay contained in the order to show cause by which these proceedings were commenced on December 19th, 1944 in the United States District Court; it opposed plaintiff's application to one of the judges of this Court for a stay pending the determination

of the appeal herein; it now opposes the present application for a continuance of the existing restraining order pending application to the Supreme Court for certiorari.

This is an action in which the sole relief sought by plaintiff is in substance the relief which plaintiff obtained in the beginning, still enjoys by virtue of the order of one of the judges
65 of this Court and will continue to profit by should the present application be granted in any form, even though necessarily limited as appellant concedes upon condition that application be made within fifteen (15) days to the Supreme Court for certiorari or in the alternative within five (5) days to a justice of the Supreme Court pending the application for certiorari. This granting from the beginning of this suit of the full relief prayed for by way of final judgment exists at the present time and will, if presently extended, continue to exist not only despite the most diligent and consistent protests by appellee that the United States District Court was wholly without jurisdiction to grant any relief, but despite the decision of the United States District Court and of this Court that appellant was without power to seek and the United States District Court without power to grant any part of the relief which appellant has thus, by the expedient of a succession of temporary restraining orders, obtained.

It is traditional that the remedy of injunction is to be sparingly exercised and never in doubtful cases. Whatever superficial showing may have appeared at the outset in this case has been thoroughly dissipated by a full consideration of the simple questions of fundamental jurisdiction which are involved. When United States District Judge Harold M. Kennedy became convinced that the District Court was wholly without power to grant the relief requested, he vacated the stay contained in the order to show cause. Now that this Court has similarly held that the District Court lacked power to grant the relief requested,
66 there would seem to be no other alternative than to rule against the present application.

As the circumstances of the case are fresh in the minds of the members of the Court, I shall not discuss the details but merely remind the Court: (1) that under the law of New York State the plan of recapitalization is now in effect and that the exercise by appellee of its corporate functions is already seriously embarrassed and will continue to be prejudiced and impaired by any continuance of the restraining order; (2) that appellant's claim that the absence of a continuance of the restraining order would "seriously impair or limit" the performance of its functions under various provisions of the Public Utility Holding

Company Act is not only matter of sheer speculation and conjecture but wholly unsubstantial and without foundation.

The application should be in all respects denied.

CHARLES G. BLAKESLEE.
Charles G. Blakeslee.

Sworn to before me this 8th day of March, 1945.

[SEAL] MARGARET A. HAIR,
Margaret A. Hair,
Notary Public, Bronx County.

67 [File endorsement omitted.]

68 In United States Circuit Court of Appeals, Second Circuit

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Order

Filed March 14, 1945

A motion having been made herein by counsel for appellant to (a) extend the presently operative restraining order heretofore granted to and including final disposition of this case by the Supreme Court of the United States upon a petition for writ of certiorari proposed to be filed on behalf of the Commission, provided that the Commission shall file its said petition within fifteen days of the disposition of this motion by this Court; or (b) to extend the presently operative restraining order heretofore granted by this Court to and including the date of a determination by the Supreme Court of the United States, or a Justice thereof, either granting or refusing to grant a temporary injunction during the pendency before the Supreme Court of said petition for a writ of certiorari upon condition that the Commission shall make application therefor to the Supreme Court, or a Justice thereof, upon notice to appellee, within five days of the disposition of this motion by this Court,

Upon consideration thereof, it is ordered that alternative relief (b) be and it hereby is granted.

ALEXANDER M. BELL, *Clerk.*

70 In United States Circuit Court of Appeals, Second Circuit

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Order for mandate

Filed March 14, 1945

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

72 [Clerk's certificate to foregoing transcript omitted in printing.]

73 Supreme Court of the United States

Order allowing certiorari

Filed March 26, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument during the session of the Court convening April 23.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 49512. U. S. Circuit Court of Appeals, Second Circuit. Term No. 1059. Securities and Exchange Commission, Petitioner vs. Long Island Lighting Company. Petition for a writ of certiorari and exhibit thereto. Filed March 19, 1945. Term No. 1059 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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628700—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1059

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LONG ISLAND LIGHTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered March 14, 1945, which affirmed the judgment entered December 21, 1944, by the United States District Court for the Eastern District of New York.

OPINIONS BELOW

The opinions in the Circuit Court of Appeals (R. 16–32) are not yet reported. The opinion of the District Court (R. 8–13) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1945 (R. 43). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pending administrative proceedings instituted by the Commission, after a complaint by preferred stockholders, to determine whether a recapitalization plan, challenged as contrary to the fair-and-equitable and public-interest standards of the Holding Company Act, should be subjected to those standards (*inter alia*, through revocation of an expressly revocable exemption order), the Company involved undertook to consummate the plan. The question presented is whether a federal district court has jurisdiction to issue an injunction so that the purpose of the administrative proceeding will not be frustrated by a *fait accompli*, and if so, whether the Commission has standing to invoke such jurisdiction.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix *infra*, pp. 21–27.

STATEMENT OF FACTS

(a) *Nature of the Proceeding Below*

This action was instituted by the Securities and Exchange Commission to enjoin respondent, Long Island Lighting Company, from completing efforts to consummate a plan of recapitalization

under New York state law, pending determination by the Commission in an administrative proceeding of the question whether the rights of stockholders sought to be affected by such plan should be subject to the reorganization standards of Section 11 of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79(a), et seq. Upon the allegations of the complaint, the Commission applied for a temporary injunction, which the district court, after hearing and argument, denied for lack of jurisdiction. The court below affirmed, one judge dissenting.

(b) *The Proceedings before the Commission*

The facts, which are not in dispute, may be summarized as follows:

Long Island, a holding company as defined in Section 2 (a) (7) of the Act, was exempted from the registration and regulatory provisions of the Act by order of the Commission dated March 27, 1936. (R. 2.) That order was expressly subject to revocation in the event the Commission should find, after opportunity for hearing, that the circumstances which gave rise to its issuance no longer exist.[1]

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[1] In the findings and opinion accompanying its order of March 27, 1936, the Commission stated (R. 2):

"Section 3 (c) provides that the Commission shall revoke such order whenever it shall find that the circumstances which gave rise to its issuance no longer exist. The provisions of Section 1 (c) and 3 (d) are also sufficient to authorize the

On November 4, 1944, a committee purporting to represent the holders of some $1,300,000 par value of Long Island's preferred stock petitioned the Commission to reopen the exemption proceedings, stating that since the issuance of the 1936 exemption order dividend arrears in excess of $10,000,000 had accumulated on the preferred stock, and that the Company was endeavoring to carry out a plan of recapitalization unfair to the preferred stockholders, subject only to such authorization as was necessary under state law from the Public Service Commission of the State of New York. (R. 2.)

On November 10, 1944, the Commission instituted administrative proceedings to determine whether Long Island's exemption should be revoked in whole or in part. The broad question raised was whether, as a result of changed circumstances, including the accumulation of preferred dividend arrears and the company's allegedly unfair plan, the Commission should find it "detrimental to the public interest or the interests of investors or consumers" to leave in force an

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Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing." (1 S. E. C. 345, 346 (1936)).

exemption from any provision or provisions of the Act.[2] (R. 2, pars. 3–4). Other important subsidiary questions of public interest were whether the securities structure of Long Island and the distribution of voting power are such as to require changes to conform to the corporate simplification standards of Section 11 (b) (2) of the Act;[3] whether the pending plan of recapitalization is so offensive to the "fair and equitable" standard of Section 11 as to require that it be subject to the

[2] Section 3 (a) of the Act and Section 1 (c) circumscribe the exemption which may be granted to holding companies, although predominantly intrastate, to the extent that the Commission finds the exemption detrimental to the public interest or the interest of investors or consumers by reason of activities in interstate commerce or directly affecting or burdening interstate commerce. Appellee's activities in these respects are in issue in the proceedings pending before the Commission. *Cf.*, e. g., *Niagara Hudson Power Corporation, et al.*, Holding Company Act Release No. 5115, where the Commission, upon a finding that a holding company offending the provisions of Section 11 (b) (2) was engaged in interstate commerce and in activities directly affecting or burdening interstate commerce, denied the holding company an exemption from the provisions of Section 11 (b) (2) without deciding whether the specific requirements of Section 3 (a), in respect of the predominantly intrastate nature of its business, were met.

[3] Section 11 (b) (2) of the Act imposes upon the Commission the duty to require that each registered holding company, and each subsidiary thereof:

"* * * shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

safeguards provided in that Section; and whether the plan is so inadequate as to leave the Company in need of further reorganization to meet the standards of Section 11 (b) (2).[4] The proceeding was broadened by orders dated November 21 and 22, 1944, whereby the Commission first instituted, and then consolidated with the pending proceeding, a separate proceeding under Section 2 (a) (7) (B) of the Act to determine whether certain persons and corporations owning or controlling substantial amounts of Long Island's outstanding common stock exercise such a controlling influence over its management or policies as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that they, or any one or more of them, be subject to the obligations, duties and liabilities imposed by the Act upon holding companies.[5] (R. 2–3.) A

[4] Section 11 (d) of the Act empowers the Commission to apply to a district court to enforce compliance with orders issued pursuant to Section 11 (b) and contemplates, among other methods of enforcement, effectuation of a "fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." Section 11 (e) provides that a company subject to such provisions may submit to the Commission a voluntary plan of compliance, which must be "fair and equitable to the persons affected by such plan" before it can be approved by the Commission; and the company may request the Commission to apply to a district court to enforce the plan which the Commission has approved.

[5] Two of the respondents in these proceedings were Delaware corporations and therefore presumably not entitled to exemption under Section 3 (a) (1) if found to be holding companies with respect to Long Island, a New York corporation.

determination by the Commission adverse to any of the respondents in either branch of the consolidated proceeding would subject Long Island and its plan of recapitalization to the jurisdiction, scrutiny, and approval of the Commission and the federal courts under the applicable standards of the Act either as a holding company, or as a subsidiary of a holding company, required to register under the Act.

The hearing in the consolidated proceeding was ordered to convene on December 19, 1944 (R. 3, par. 5). On the preceding day, December 18, 1944, the Commission learned through the public press that Long Island was undertaking to consummate the plan under New York state law without awaiting a determination whether the plan should be subjected to scrutiny under the Holding Company Act. Long Island had not advised the Commission that the New York Public Service Commission had acted favorably on the plan and that the Company was proceeding immediately to consummate the plan. The New York Commission, by order dated December 14, 1944, had allowed Long Island thirty days to consummate the plan and would doubtless have allowed additional time.[6]

[6] The preferred stockholders' brief, *amicus curiae*, submitted in the court below, pointed out that the preferred stockholders, as objectors, had thirty days to petition for rehearing and request the New York Commission to modify or set aside its order under Section 22 of the New York Public Service Law.

(c) *Necessity for equitable relief to safeguard the public interest and the interests of investors*

The record does not describe the plan in detail. The complaint states that it is a plan of recapitalization affecting the relative rights of more than 10,000 public investors in many states (R. 3–4, 5; pars. 7, 12).[7] The complaint alleged (R. 4):

> There is serious doubt whether the said plan of recapitalization of the Long Island Lighting Company is fair and equitable to the persons affected thereby, and whether if it were presented to the Commission it would be found to meet the standards of the Act prescribed by Congress for the protection of investors. It is also doubtful, because of the unsatisfactory capitalization

[7] The brevity of the complaint is attributable in part to the necessity for instituting the action below within less than 24 hours after the Commission learned of the company's actions. Since the district court's decision rested exclusively on jurisdictional grounds there was no necessity or occasion for enlarging on the brief allegations in the complaint. In our brief in the court below we submitted the following summary of the terms of the plan and no question was raised by Long Island as to the adequacy of this summary:

"Under the plan preferred stockholders are to surrender 40% of all their contractual rights, including their preferential claim to current dividends, and liquidation and redemption rights, except that dividends on the preferred stocks accumulated and unpaid since 1938, aggregating some $10,000,000, will remain unpaid and will continue to represent a prior claim to available income *vis-a-vis* the new common stock proposed to be issued. 50.3% of such new common stock will be distributed to preferred stockholders in exchange for the rights which they are to surrender."

structure of the company, if the said plan were put into effect, that the plan could be found by the Commission to be in the public interest and for the interests of investors or consumers.[8]

The Commission, as a litigant, in order to avoid prejudging an issue which might come before it in its quasi-judicial capacity, limited itself to alleging its "serious doubt" as to the fairness and adequacy of the plan under Holding Company Act standards. Its instructions to its counsel to file the complaint for injunction represented, as the dissenting judge below observed, the Commission's conclusion that the action of the company sought to be enjoined was sufficiently likely to prejudice the interests which the Commission has a statutory obligation to protect to warrant seeking equitable relief to preserve the status quo.

The New York State Public Service Commission, which had fully considered the plan of recapitalization, had condemned it as unfair both in the colloquial sense and in the light of its

[8] In paragraph 11 of the complaint the Commission further alleged (R. 4–5):

"In the event the above described proceedings pursuant to Section 3 (a) or 2 (a) (7) (B) of the Act were to result in subjecting Long Island Lighting Company to the provisions of Section 11 of the Act, it is probable that a reorganization of the company on a fair and equitable basis, substantially at variance with the terms and conditions of the present plan, and with due regard to the public interest and the interest of investors and consumers, would be ordered by the Commission pursuant to Section 11 (b) (2) of the Act."

understanding of Holding Company Act standards, although declaring itself lacking in power to rectify the situation under state law. The plan had been the subject of proceedings before the New York Commission since February, 1944. In an interim opinion dated July 27, 1944, that Commission indicated that in numerous respects the plan dealt unfairly with the interests of preferred stockholders, and stated, among other things (R. 3–4):

> It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion to their claims against the company?
>
> The power of the Commission to remedy this condition directly is nil. The Securities and Exchange Commission has dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the

interests affected. Counsel for the company argues that they have "made a sacrifice" because they could have sold their stock prior to the stockholders' meeting of April 25, 1944 for at least eleven-sixteenths dollars per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years.

On December 14 the New York Commission issued an order authorizing the plan after certain minor modifications. Two of the five members of that Commission declined to vote on the entry of the order for the stated reason that proceedings under the Holding Company Act with respect to Long Island were pending before the Securities and Exchange Commission and were at a crucial stage (R. 4, par. 8).

Although the Securities and Exchange Commission assumed that the company's action in

filing the charter amendment with the Secretary of State of New York had effectuated, so far as state law is concerned, the change of security holders' rights contemplated by the plan, it believed that there was still time to prevent an alteration of their rights beyond the possibility of rectifying the situation under the "fair and equitable" standard of the Holding Company Act.[9] No steps had been taken to make physical changes in the outstanding securities of the company to reflect the changes in rights under the plan. Accordingly, the further action by way of consummation which the Commission sought to enjoin included the distribution of new common shares, in lesser amounts, to existing common stockholders, the overprinting of the preferred stockholders' existing certificates to represent the reduction of their preferential rights, and the issuance of new common shares to the preferred stockholders. The complaint alleged that (R. 5):

> The taking of the further steps to consummate the plan as described in the

[9] In *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 15–18, it was held that an administrative proceeding to show cause why a "stop order should not be issued suspending the effectiveness of such registration statement" (i. e., suspending a license to sell securities) was analogous to a suit in equity to obtain an injunction and should be governed by like considerations. This Court there indicated to be applicable in the administrative context the equitable principles under which changes of the status quo pending a hearing and determination might be required to be restored even though no restraining order or preliminary injunction is issued.

> preceding paragraph will tend to induce trading in securities on the basis of said plan being an accomplished fact without disclosure of the fact that proceedings under the Act may require a radically different plan and may require determination of the fairness and equity of any new plan with reference to the relative rights of security holders as they existed prior to the consummation of the present plan. The result will be confusion to security holders as well as substantial difficulties in the discharge by the Commission and the federal courts of their duties with respect to the effectuation of fair and equitable plans of reorganization to comply with Section 11 (b) of the Act.

The Commission's position was and is that as a governmental agency it has standing to invoke the injunctive aid of a federal court of equity to preserve a status quo in order to prevent its statutory processes from proving nugatory and investors from having their rights altered through precipitous action of a holding company management in contravention of the purposes of the Act. While resting primarily upon general equitable power, we deem this position in no way inconsistent with, if not expressly implemented by, the enforcement provisions of the Act.

REASONS FOR GRANTING THE WRIT

1. While no constitutional issue is presented, the question is one of substantial public impor-

tance, involving the basic relationship between the federal courts and federal administrative agencies. The decision below unduly limits the jurisdiction of the courts to aid administrative agencies and permits easy evasion of their regulatory jurisdiction. The decision is novel and has given rise to divergent opinions by the three judges of the court below.

The basic issue is the power of the federal courts to use their injunctive processes to preserve the status quo pending a determination by the Commission. In the instant case, Long Island Lighting Company is a public utility holding company exempted from the operation of the Public Utility Holding Company Act by an order which is expressly revocable after notice and opportunity for hearing. The Commission gave notice of a hearing on the question of revoking the order. While this notice was outstanding, and before either hearing or decision, Long Island proposed to take action designed to make moot important objectives of the proceeding before the Commission. A primary question before the Commission was whether Long Island's existing financial structure and its plan were such as to require that the company be subjected to regulation under the Act and that its financial structure be reorganized under the "fair and equitable" standard of the Act. Long Island, in the meanwhile, was attempting to defeat the Commission's jurisdiction by consummating a

plan of reorganization of such a character that (in all probability) it could not meet the standards of the Act. Indeed, the plan was stated by the New York Public Service Commission to be lacking in fairness, a condition which it was admittedly powerless to correct. Faced with this situation, and in order to prevent nullification of its processes for protection of investors, the Commission sought the aid of the district court for an injunction to preserve the status quo, pending the Commission's determination. The court below has denied any jurisdiction to grant such relief to the Commission.

The decision is not based on any exercise of judicial discretion, but is rested solely on the theory that no matter how strong the case for an injunction, the Commission lacks standing to sue and the court lacks jurisdiction. In the present case the decision permits the effectuation of a plan affecting the interests of some 10,000 public stockholders of the company without giving those stockholders an opportunity to obtain the benefits of a determination under the standards of the Public Utility Holding Company Act designed for their protection. This would permit a misuse of the exemption provisions of the Act since it would allow companies operating under exemptions to frustrate an orderly determination of whether those exemptions should be terminated, by taking precipitous action and confronting the Commis-

sion with a *fait accompli* before it could arrive at a decision.

The granting of interlocutory relief pending the determination of a controversy, in order to prevent the controversy from becoming moot, has been a traditional form of equitable relief. With the creation of administrative agencies charged with the protection of great public interests and, as this Court has held, standing to protect those interests in court (see *Securities and Exchange Commission* v. *U. S. Realty & Improvement Company,* 310 U. S. 434) it would seem that power exists in the courts to grant administrative agencies similar interlocutory relief to preserve the status quo. The decision below denies this proposition. It is submitted that the result is contrary to the purpose of Congress in creating administrative agencies. Those agencies are intended to be effective and flexible instruments for carrying out Congressional policies. In aid of those agencies the normal powers of the courts should be available in order that the Congressional policies may not be frustrated. If a more limited approach is taken, it is believed that, as Judge Clark indicated, respondent was under a duty pursuant to the Act not to render the proceeding moot. (Cf. *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 15–18; and see *Wartman* v. *Wartman,* 29 Fed. Cas. No. 17,210, per Taney, C. J., (p. 303)), and the case is then the normal one of enjoining, under sections 18 (f) and 25 of

the Holding Company Act, violation of a requirement or duty imposed under the Act.

At the very least, therefore, the substantial questions presented by the case, the divergent opinions of the court below, the novelty of the questions, and the serious consequences of the decision below upon harmonious relations between administrative agencies and courts in carrying out Congressional policies all suggest the importance of a decision by this Court.

2. The decision below is, we submit, incorrect and in probable conflict with decisions of this Court. As pointed out in Judge Clark's dissenting opinion, the decision of the court below is in conflict with the holding of this court in *Securities and Exchange Commission* v. *U. S. Realty & Improvement Company,* 310 U. S. 434. That case affirmed the standing of the Commission to intervene and to appeal from an adverse decision in a statutory proceeding wherein the statute did not give it such standing and wherein its sole purpose for intervention was to protect its potential jurisdiction in another type of proceeding, by preventing evasion of that jurisdiction through the pending proceeding.[10] The holding of the court below, in contrast, denies the Commission's standing to

[10] See also *In re Debs*, 158 U. S. 564, 584, 586, which was among the cases cited by this Court in the *Realty* case in support of the holding that the Commission has standing to obtain judicial aid in the maintenance of its statutory authority and the performance of its public duties. This decision the dissenting judge below characterized as a

protect the public interest entrusted to its care, statutory language conferring such jurisdiction. Not only the specific decision of the court below, but its basic approach to the function of an administrative agency and its duty and right to protect the public interest entrusted to its care, is contrary to the holding of this Court in the *Realty* case."

The court below held that there was no power in a federal court to grant the relief sought by the Commission "until by formal action of the Commission [the company] was brought within the jurisdiction of the Act which alone created the Commission and from which it alone derives authority." (R. 22.) This argument ignores the fact that, as pointed out in the dissenting opinion, the Commission did have an undisputed statutory jurisdiction which was being exercised to the fullest extent that seemed presently appropriate. Indeed the whole basis for respondent's argument

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"still broader assertion of federal power and duty." (R. 31.)

[11] The court below held the *Realty* case inapplicable because deemed to rest upon a "permissive rule of procedure" under Rule 24 of the Rules of Civil Procedure, and regarded standing to intervene as not implying any right to bring an original suit. But in the *Realty* case the Commission was accorded an independent standing to appeal to protect its jurisdiction, although the right to appeal is expressly denied the Commission in the exercise of its statutory functions under Chapter X. Additional difficulties with the distinction found by the majority are stated in footnote 8 to the dissenting opinion below. (R. 30.)

that the district court lacked jurisdiction to grant interlocutory relief was the absence of any charge of literal "violation" of the Act, which in turn could be urged only because Long Island had affirmatively invoked the jurisdiction of the Commission to obtain a revocable exemption under the Act. If Long Island had been confident that it was wholly outside of the reach of the statute, and had not sought an affirmative exemption order, the Commission would have been in a position to allege in an equity suit that its activities concerning the plan constituted a violation of the Act.[13] In that event the Commission would have had unquestioned standing to obtain interlocutory relief pending a judicial determination of the issue of whether Long Island is a holding company within the reach of the statute.

The approach of the majority opinions is contrary to the many admonitions of this Court that administrative agencies, in carrying out the Congressional policy, should be aided by the courts and

[13] *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, was a suit to enjoin Bond & Share from violation of the registration provisions of the Act. While Bond & Share made no claim to exemption, a holding company which does claim to be beyond the reach of the statute could raise such an issue as a defense. Thus the only respect in which the present administrative proceeding would involve broader issues than would arise in an injunction suit is that it does concern the exercise by the Commission of such discretion as the Act confers on it with respect to exemptions—a matter relating to the exercise of administrative jurisdiction, not to the existence thereof.

should not be treated as an "alien intruder, to be tolerated if it must be, but never to be encouraged or aided." *United States* v. *Morgan*, 307 U. S. 183, 191. The same injunction was repeated in *Hecht Company* v. *Bowles*, 321 U. S. 321, and, in dealing with a situation closely analogous to the present one, this Court in *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15, sustained the implied and inherent power of reviewing courts to preserve the status quo in order "to save the public interest from injury or destruction" during the pendency of an appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States* v. *Morgan*, 307 U. S. 183, 190–91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

MARCH 1945.

APPENDIX

The Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79a et seq., provides in pertinent part as follows:

Section 1 * * *

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power

to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of in-

vestors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i) (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judg-

ment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility

company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commis-

sion, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

Section 18 * * *

(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

SEC. 20. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including

rules and regulations defining accounting, technical, and trade terms used in this title.

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1059

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LONG ISLAND LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 16–32) are not yet reported. The opinion of the District Court (R. 8–13) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1945 (R. 43). The petition for a writ of certiorari was filed March 19, 1945, and was granted March 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pending administrative proceedings instituted by the Commission, after a complaint by preferred stockholders, to determine whether a recapitalization plan, challenged as contrary to the fair-and-equitable and public-interest standards of the Holding Company Act, should be subjected to those standards (*inter alia*, through revocation of an expressly revocable exemption order), the Company involved undertook to consummate the plan. The question presented is whether a federal district court has jurisdiction to issue an injunction so that the purpose of the administrative proceeding will not be frustrated by a *fait accompli*, and if so, whether the Commission has standing to invoke such jurisdiction.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 55 *et seq.*

STATEMENT

(a) *Nature of the Proceeding Below*

This action was instituted by the Securities and Exchange Commission to enjoin respondent, Long Island Lighting Company, from completing efforts to consummate a plan of recapitalization under New York state law, pending determination

by the Commission in an administrative proceeding of the question whether the rights of stockholders sought to be affected by such plan should be subject to the reorganization standards of Section 11 of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79 *et seq.*). Upon the allegations of the complaint, the Commission applied for a temporary injunction, which the district court, after hearing and argument, denied for lack of jurisdiction. The court below affirmed, one judge dissenting.

(b) *The Proceedings before the Commission*

The facts, which are not in dispute, may be summarized as follows:

Long Island, a holding company as defined in Section 2 (a) (7) of the Act, was exempted from the registration and regulatory provisions of the Act by order of the Commission dated March 27, 1936 (R. 2). That order was expressly subject to revocation in the event the Commission should find, after opportunity for hearing, that the circumstances which gave rise to its issuance no longer exist. (R. 2.)

On November 4, 1944, a committee purporting to represent the holders of some $1,300,000 par value of Long Island's preferred stock petitioned the Commission to reopen the exemption proceedings, stating that since the issuance of the 1936 exemption order dividend arrears in excess of

$10,000,000 had accumulated on the preferred stock, and that the Company was endeavoring to carry out a plan of recapitalization unfair to the preferred stockholders, subject only to such authorization as was necessary under state law from the Public Service Commission of the State of New York (R. 2).

On November 10, 1944, the Commission instituted administrative proceedings to determine whether Long Island's exemption should be revoked in whole or in part. The broad question raised was whether, as a result of changed circumstances, including the accumulation of preferred dividend arrears and the company's allegedly unfair plan, the Commission should find it "detrimental to the public interest or the interests of investors or consumers" to leave in force an exemption from any provision or provisions of the Act.[1] (R. 2–3, pars. 3–4.) Other important sub-

[1] Section 3 (a) of the Act and Section 1 (c) circumscribe the exemption which may be granted to holding companies, although predominantly intrastate, to the extent that the Commission finds the exemption detrimental to the public interest or the interest of investors or consumers by reason of activities in interstate commerce or directly affecting or burdening interstate commerce. Appellee's activities in these respects are in issue in the proceedings pending before the Commission. *Cf.*, e. g., *Niagara Hudson Power Corporation, et al.*, Holding Company Act Release No. 5115, where the Commission, upon a finding that a holding company offending the provisions of Section 11 (b) (2) was engaged in interstate commerce and in activities directly affecting or burdening interstate commerce, denied the

sidiary questions of public interest were whether the security structure of Long Island and the distribution of voting power are such as to require changes to conform to the corporate simplification standards of Section 11 (b) (2) of the Act;[2] whether the pending plan of recapitalization is so offensive to the "fair and equitable" standard of Section 11 as to require that it be subject to the safeguards provided in that Section; and whether the plan is so inadequate as to leave the Company in need of further reorganization to meet the standards of Section 11 (b) (2).[3] The proceeding

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holding company an exemption from the provisions of Section 11 (b) (2) without deciding whether the specific requirements of Section 3 (a), in respect of the predominantly intrastate nature of its business, were met.

[2] Section 11 (b) (2) of the Act imposes upon the Commission the duty to require that each registered holding company, and each subsidiary thereof:

"* * * shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

[3] Section 11 (d) of the Act empowers the Commission to apply to a district court to enforce compliance with orders issued pursuant to Section 11 (b) and contemplates, among other methods of enforcement, effectuation of a "fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." Section 11 (e) provides that a company subject to such provisions may submit to the Commission a voluntary plan of compliance, which must be "fair and equitable to the

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was broadened by orders dated November 21 and 22, 1944, whereby the Commission first instituted, and then consolidated with the pending proceeding, a separate proceeding under Section 2 (a) (7) (B) of the Act to determine whether certain persons and corporations owning or controlling substantial amounts of Long Island's outstanding common stock exercise such a controlling influence over its management or policies as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that they, or any one or more of them, be subject to the obligations, duties and liabilities imposed by the Act upon holding companies.[4] (R. 2–3.) A determination by the Commission adverse to any of the respondents in either branch of the consolidated proceeding would subject Long Island and its plan of recapitalization to the jurisdiction, scrutiny, and approval of the Commission and the federal courts under the applicable standards of the Act either as a holding company, or as a subsidiary of a holding company, required to register under the Act.

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persons affected by such plan" before it can be approved by the Commission; and the company may request the Commission to apply to a district court to enforce the plan which the Commission has approved.

[4] Two of the respondents in these proceedings were Delaware corporations and therefore presumably not entitled to exemption under Section 3 (a) (1) if found to be holding companies with respect to Long Island, a New York corporation.

The hearing in the consolidated proceeding was ordered to convene on December 19, 1944 (R. 3, par. 5). On the preceding day, December 18, 1944, the Commission learned through the public press that Long Island was undertaking to consummate the plan under New York state law without awaiting a determination whether the plan should be subjected to scrutiny under the Holding Company Act. Long Island had not advised the Commission that the New York Public Service Commission had acted favorably on the plan and that the Company was proceeding immediately to consummate the plan. The New York Commission, by order dated December 14, 1944, had allowed Long Island thirty days to consummate the plan and would doubtless have allowed additional time.[8]

(c) *Necessity for equitable relief to safeguard the public interest and the interests of the investors*

The record does not describe the plan in detail. The complaint states that it is a plan of recapitalization affecting the relative rights of more than 10,000 public investors in many states (R.

[8] The preferred stockholders' brief, *amicus curiae*, submitted in the court below, pointed out that the preferred stockholders, as objectors, had thirty days to petition for rehearing and request the New York Commission to modify or set aside its order under Section 22 of the New York Public Service Law.

3–4, 5; pars. 7, 12).[6] The complaint alleged (R. 4):

> There is serious doubt whether the said plan of recapitalization of the Long Island Lighting Company is fair and equitable to the persons affected thereby, and whether if it were presented to the Commission it would be found to meet the standards of the Act prescribed by Congress for the protection of investors. It is also doubtful, because of the unsatisfactory capitalization structure of the company, if the said plan were put into effect, that the plan could be found by the Commission to be in the public interest and for the interests of investors or consumers.[7]

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[6] The brevity of the complaint is attributable in part to the necessity for instituting the action below within less than 24 hours after the Commission learned of the company's actions. Since the district court's decision rested exclusively on jurisdictional grounds there was no necessity or occasion for enlarging on the brief allegations in the complaint. In our brief in the court below we submitted the following summary of the terms of the plan and no question was raised by Long Island as to the adequacy of this summary:

"Under the plan preferred stockholders are to surrender 40% of all their contractual rights, including their preferential claim to current dividends, and liquidation and redemption rights, except that dividends on the preferred stocks accumulated and unpaid since 1938, aggregating some $10,000,000, will remain unpaid and will continue to represent a prior claim to available income *vis-a-vis* the new common stock proposed to be issued. 50.38% of such new common stock will be distributed to preferred stockholders in exchange for the rights which they are to surrender."

[7] In paragraph 11 of the complaint the Commission further alleged (R. 4–5):

"In the event the above described proceedings pursuant to Section 3 (a) or 2 (a) (7) (B) of the Act were to result

The Commission, as a litigant, in order to avoid prejudging an issue which might come before it in its quasi judicial capacity, limited itself to alleging its "serious doubt" as to the fairness and adequacy of the plan under Holding Company Act standards. Its instructions to its counsel to file the complaint for injunction represented, as the dissenting judge below observed, the Commission's conclusion that the action of the company sought to be enjoined was sufficiently likely to prejudice the interests which the Commission has a statutory obligation to protect to warrant seeking equitable relief to preserve the status quo.

The New York State Public Service Commission, which had fully considered the plan of recapitalization, had condemned it as unfair both in the colloquial sense and in the light of its understanding of Holding Company Act standards, although declaring itself lacking in power to rectify the situation under state law. The plan had been the subject of proceedings before the New York Commission since February, 1944. In an interim opinion dated July 27, 1944, that Commission indicated that in numerous respects

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in subjecting Long Island Lighting Company to the provisions of Section 11 of the Act, it is probable that a reorganization of the company on a fair and equitable basis, substantially at variance with the terms and conditions of the present plan, and with due regard to the public interest and the interest of investors and consumers, would be ordered by the Commission pursuant to Section 11 (b) (2) of the Act."

the plan dealt unfairly with the interests of preferred stockholders, and stated, among other things (R. 3–4):

> It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?
>
> The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have "made a sacrifice" because they could have sold their stock prior to the stockholders' meeting of April 25, 1944 for at least eleven-sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is

to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years.

On December 14 the New York Commission issued an order authorizing the plan after certain minor modifications. Two of the five members of that Commission declined to vote on the entry of the order for the stated reason that proceedings under the Holding Company Act with respect to Long Island were pending before the Securities and Exchange Commission and were at a crucial stage (R. 4, par. 8).

Although the Securities and Exchange Commission assumed that the company's action in filing the charter amendment with the Secretary of State of New York had effectuated, so far as state law is concerned, the change of security holders' rights contemplated by the plan, it believed that there was still time to prevent an alteration of their rights beyond the possibility

of rectifying the situation under the "fair and equitable" standard of the Holding Company Act. No steps had been taken to make physical changes in the outstanding securities of the company to reflect the changes in rights under the plan. Accordingly, the further action by way of consummation which the Commission sought to enjoin included the distribution of new common shares, in lesser amounts, to existing common stockholders, the overprinting of the preferred stockholders' existing certificates to represent the reduction of their preferential rights, and the issuance of new common shares to the preferred stockholders. The complaint alleged that (R. 5):

> The taking of the further steps to consummate the plan as described in the preceding paragraph will tend to induce trading in securities on the basis of said plan being an accomplished fact without disclosure of the fact that proceedings under the Act may require a radically different plan and may require determination of the fairness and equity of any new plan with reference to the relative rights of security holders as they existed prior to the consummation of the present plan. The result will be confusion to security holders as well as substantial difficulties in the discharge by the Commission and the federal courts of their duties with respect to the effectuation of fair and equitable plans of reorganization to comply with Section 11 (b) of the Act.

The Commission's position was and is that as a governmental agency it has standing to invoke the injunctive aid of a federal court of equity to preserve a status quo in order to prevent its statutory processes from proving nugatory and investors from having their rights altered through precipitous action of a holding company management in contravention of the purposes of the Act. While resting primarily upon general equitable power, we deem this position in no way inconsistent with, if not expressly implemented by, the enforcement provisions of the Act.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the Commission's complaint did not set forth a valid claim for equitable relief.

2. The court below erred in holding that a federal court has no jurisdiction in equity or under the provisions of the Holding Company Act to entertain the Commission's complaint.

3. The court below erred in holding that the Commission lacked standing to sue for equitable relief to prevent Long Island from frustrating the investor safeguards of the Act by consummating its plan of recapitalization pending the Commission's administrative proceeding.

SUMMARY OF ARGUMENT

The Commission's complaint for injunctive relief sought to prevent Long Island from frus-

trating the investor safeguards of the Act by consummating its plan of recapitalization pending administrative proceedings. Jurisdiction of a federal court to aid the Commission in enforcing this right by a restraining order flows from the traditional equity power granted a federal court by Section 24 of the Judicial Code which includes ancillary relief in support of a proceeding in another tribunal. In denying the sufficiency of the Commission's complaint, the court below rested on a distinction between the protection of an existing and of a hypothetical jurisdiction. This reasoning fails to take account of the nature and importance of the existing jurisdiction which the Commission was seeking to protect. The purpose of the Act was to protect public investors from typical corporate abuses in the holding company field, including unfair plans of recapitalization; the Commission was given responsibility to secure investor protection from such abuses; the structure and legislative history of the exemption and revocation provisions of the Act specifically authorize the Commission to consider abuses of this kind, including changed conditions, in determining whether the public interest requires revocation of an exemption; and on the facts of this case the Commission's ability to perform its public functions of protecting Long Island's investors depends on its right to prevent Long Island from disturbing the status quo.

Further power may be drawn from the provision of Section 25 of the Act, giving federal courts jurisdiction of suits in equity to enforce any "liability or duty created by" the Act. The restrictive canons of statutory construction relied on by the court below to preclude the Commission from any relief not based upon the charge of a literal "violation" of the Act or a rule or order issued thereunder (Section 18 (f)), are inapplicable in view of the purpose of the Act to "meet the problems and eliminate the evils" which Congress had perceived.

The Commission's standing to sue for such relief in a federal court is supported by decisions of this Court which uphold the right of an administrative agency to invoke judicial aid to protect the public functions of the agency and which broadly indicate the need for a harmonious interplay of functions between courts and administrative agencies in safeguarding the public interest.

ARGUMENT

I

The Commission's complaint falls within the purview of traditional equity jurisdiction

The issues presented are: (1) whether the Commission's complaint sets forth an equitable claim of the character which falls within the purview of traditional equity jurisdiction; (2) whether

under the Judicial Code and the Holding Company Act the federal courts have jurisdiction to enforce such an equitable claim; and (3) whether the Commission has standing to invoke that jurisdiction in its own name. These issues are interrelated and were so treated by the court below. While the court decided that the Commission lacked standing to sue and that the federal courts lacked jurisdiction to grant the relief sought, it was not suggested by the court, or urged by Long Island, that any one other than the Commission was the proper party to sue or that relief should have been sought in a state rather than a federal court.

Thus the ultimate issue is whether it is appropriate under general equitable principles, and consistent with the provisions of the Act, that the status quo be preserved pending a determination in the administrative proceeding; the arguments that the Commission lacks standing to sue for such relief and that a federal court lacks jurisdiction to grant it are predicated on a construction of the Act precluding such relief. As we show below, this involves an unduly restrictive construction of the Act, as well as a misinterpretation of this Court's opinion in *Securities and Exchange Commission* v. *United States Realty & Improvement Company*, 310 U. S. 434.

Moreover, and apart from this consideration, the majority opinion below reflects a confusion

between the existence of jurisdiction in the Commission and the application of particular regulatory provisions of the Act contingent upon the exercise of the Commission's jurisdiction to grant and revoke exemptions. Although the company had itself invoked the jurisdiction of the Commission to obtain a revocable exemption under the Act,[18] and the Commission was in fact exercising an unquestioned jurisdiction to determine whether that exemption should be revoked, the court below regarded the case as one in which protection was sought for "a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise." The court accordingly put to one side decisions which sustain the right of a federal court of equity to preserve a status quo by injunction "to protect a jurisdiction otherwise acquired."

Courts will, of course, issue injunctions to preserve the status quo pending a judicial determination, notwithstanding an undetermined issue as to the court's jurisdiction over person or subject matter. In *Merrimack River Savings Bank* v. *Clay*

[18] Had Long Island ignored the Act, its efforts to recapitalize would have posed an issue of violation of Section 4 within the letter of Section 18 (f). Cf. *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419. In such a suit there would be no question about jurisdiction to grant interlocutory relief.

Center, 219 U. S. 527, 534, this Court held that a lower court, even though determining that there was a lack of federal jurisdiction over the cause, may properly continue in effect, pending appeal, a temporary injunction previously granted. To fail to accord more modest protection to an administrative agency would seem to stem from regarding it as "an alien intruder", contrary to admonitions of this Court. More specifically, this Court has recognized the propriety of protecting the exercise of administrative authority pending an administrative determination of jurisdictional questions. Thus, in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, and *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375, this Court held that a federal administrative proceeding in which the ultimate regulatory authority of the Commission was to be determined was entitled to immunity from injunctive restraint which would have adjudicated *in limine* the jurisdictional issue. In *Endicott-Johnson Corp.* v. *Perkins,* 317 U. S. 501, it was held that an administrative proceeding under which the question of regulatory jurisdiction was likewise to be determined is entitled to the assistance of the subpoena power. In the light of these cases, we submit that the court below erred in holding that the Commission's jurisdiction here involved was too hypothetical to be entitled to the protection of the courts.

To demonstrate that the Commission did have an unquestioned jurisdiction which it was exercising, as the dissenting judge maintained, to the full extent presently applicable (R. 31), and that protection of such jurisdiction is essential to the performance of the Commission's statutory functions, we turn to an examination of the exemption provisions of the statute.

The Holding Company Act deals only with holding companies whose subsidiaries operate in the electric and gas utility fields. Long Island is such a holding company. (See the definitions in Sections 2 (a) (3), (4), (7) and (8).) In the absence of exemption, Long Island would be required to register under Sections 4 and 5 of the Act, and would be subject to the regulatory provisions applicable to registered holding companies, including those relating to its security structure and to plans for recapitalization thereof. Section 3 (a), however, provides that: "The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, *unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers,* if"—the holding company meets the conditions specified in one of five numbered categories. (Italics supplied.) The categories under which

exemption may be granted relate in general to the holding company's being (1) predominantly intrastate in character, (2) predominantly a public-utility company, (3) primarily in the non-public utility field, (4) temporarily a holding company, or (5) without material utility interests within the United States. The exemption granted to Long Island was based on a Commission finding that it satisfied the qualifications of the first of these categories, and that it did not then appear that exemption should be denied or limited under the "unless and except" clause. Under Section 3 (c), "the filing of an application in good faith under subsection (a)" exempts the applicant "until the Commission has acted upon such application." Section 3 (c) also provides that the Commission, *inter alia,* on its own motion shall revoke an exemption whenever it "finds that the circumstances which gave rise to the issuance of such order no longer exist."

When Long Island initially applied for exemption from registration and regulation under the Act, Section 3 (c) gave it the benefit of a temporary exemption pending Commission action on the application,[*] conditioned, however, on the

[*] The temporary exemption afforded by Section 3 (c) is a matter of not inconsiderable practical significance since literally hundreds of exemption applications were filed in the period immediately following the passage of the Act and immediately following the decision of this Court in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419.

application being made in "good faith," and when thereafter the Commission proceeded under Section 3 (a) to consider whether to issue an order granting Long Island's application, the Commission was specifically empowered by Section 3 (a) to deny or limit this exemption "in so far as it finds the exemption detrimental to the public interest or the interest of investors or consumers."* Finally, under Section 3 (c), and the express terms of the order in question, the exemption granted could later be revoked by further order of the Commission upon a finding "that the circumstances which gave rise to the issuance of such order no longer exist."

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*In its findings and opinion accompanying its order of March 27, 1936, the Commission thus described its power:

"Section 3 (c) provides that the Commission shall revoke such order whenever it shall find that the circumstances which gave rise to its issuance no longer exist. The provisions of Section 1 (c) and 3 (c) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing (1 S. E. C. 345, 346 (1936))." (R. 2.)

Legal problems which might arise out of the Commission's administrative proceeding are, of course, not relevant here. No order has been entered in that proceeding, and if an order were issued revoking Long Island's exemption such legal problems would be relevant in a judicial proceeding to review that order.

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The legislative history of the Act shows clearly that both the public-interest qualification to exemption, and the change-of-circumstances standard applicable to revocation proceedings, were intended by Congress as means to prevent abuse and circumvention by companies enjoying an exemption. The House and Senate Committee reports expressly state that the exemptions provided in the Act were considered broad "beyond what would be justified if the exemptions had been made unqualified and self-operative." What "justified" the exemption provisions as they stood was deemed to be the revocation provision of Section 3 (c) which the Committees construed to be a power "to correct [an exemption order] when abused or used to circumvent the purposes of the title."[10] And since denial of any exemption, or denial of exemption from particular provisions of the Act, could have been predicated initially upon detriment to the interest of the public and of investors, rather than upon failure

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[10] S. Rep. No. 621, 74th Cong., 1st sess., p. 24; H. Rep. No. 1318, 74th Cong., 1st sess., p. 11.

The Commission has not considered that the effectuation of this Congressional policy requires surveillance of the activities of the hundreds of holding companies and subsidiaries which, like Long Island, have been exempted without qualification from the regulatory provisions of the Act, including those requiring reports. Instead, as this case indicates, the Commission will investigate and act in those situations where facts brought to the Commission's attention disclose a need for corrective action.

to satisfy the rule-of-thumb conditions specified in the five numbered clauses of Section 3 (a), it seems plain that the circumvention and abuse which might require revocation were as likely to spring from new circumstances related to the public interest as from a change in these specified conditions. The power of revocation thus granted for the declared purpose of preventing an exemption from being misused to circumvent the statutory purposes, is the power which the Commission was undertaking to exercise in its administrative proceeding. The broad question presented was whether, in view of Long Island's security structure, the alleged unfairness and inadequacy of its proposed plan and the widespread distribution of its securities, further continuation of the exemption would be "detrimental to the public interest or the interest of investors"—or whether there should be revocation of the exemption, at least to the extent necessary to permit the Commission to require a fair, equitable and adequate plan for elimination of inequitable distribution of voting power and the existing complexities of Long Island's financial structure. This public interest question was interrelated with the question whether the circumstances which gave rise to the original unrestricted exemption had changed in view of the default in the payment of preferred dividends and the accumulation of over $10,000,000 of

arrears subsequent to the exemption order, and Long Island's attempt to carry out a recapitalization plan of doubtful fairness.

In what ways did these preferred dividend arrearages and the questionable recapitalization plan suggest possible abuses of the investor safeguards provided by the Act?

In the first place, the $10,000,000 of dividend arrearages on Long Island's preferred stock accumulated between 1938 and 1944 reflected an unhealthy financial condition and management practice.[11] This the New York Public Service Commission has sharply criticized with the statement that:

> Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them [the common stockholders] to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years.

What was thus indicated was the kind of condition and practice that the regulatory provisions

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[11] See Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VII (Management Plans Without Aid of Committees), especially pp. 109–197.

of the Holding Company Act were expressly intended to deal with."[12]

Secondly, plans of recapitalization under lax or ineffective state laws offered by holding company managements as devices to "cure" capital impairments and remove blocks to the payment of dividends out of current earnings, were specifically considered by Congress and intended to be replaced by "fair and equitable" plans supervised, and, if need be, compelled by the Commission.

Thus, the reports of the House and Senate committees stated that the reason why Section 6 (a) (2) gave the Commission regulatory power over the alteration of "priorities, preferences, voting power or other rights" of the security holders of registered holding companies and their subsidiaries (practices of considerable relevancy to typical recapitalization plans) was that:

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[12] Section 7 (c) forbids the issuance of any preferred stock by a registered holding company, except subject to such terms and conditions as the Commission may deem necessary or appropriate in the public interest and for the protection of investors (Sec. 7 (c), (d), (e) and (f)). Section 12 (c) forbids a registered holding company to pay any dividends in contravention of Commission rules or orders designed to protect its financial integrity and curb the payment of dividends out of capital or unearned surplus. Finally, where excessive preferred dividend arrearages and other unsound financial conditions in a registered holding company have resulted in an unfair and inequitable distribution of voting power among its security holders, Sections 11 (b) (2) and 11 (d) empower the Commission to compel a reorganization of the Company to correct the inequity.

> * * * [this] provision is designed to protect the investor where the charter of the company under the lax provisions of the corporate laws of some of the States affords him no protection against the confiscation of his rights.[19]

Furthermore, the Report of the National Power Policy Committee, appended to the Report of the Senate Committee (S. Rep. No. 621, 74th Cong., 1st sess., at p. 58), recommended that while the owners of holding company securities should have every opportunity to work out their own plans of reorganization—

> That opportunity should, of course, be vigilantly guarded to protect the average investor from the exploitation threatening him almost as a matter of course under our usual methods and mores of corporate reorganization. In destroying the abuses of the holding companies, the Government must not leave great groups of helpless investors to the certain abuses of extensive hurried corporate reorganizations. The dominant groups who have ruthlessly plucked the investor in promoting some

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[19] S. Rep. No. 621, 74th Cong., 1st sess., at p. 26. With regard to the companion provisions of Section 7 (f) the Report stated (p. 28) that these provisions were "designed to give adequate protection to investors and consumers * * * and are in accord with the *underlying purpose of the legislation* to give to investors and consumers full protection against the deleterious practices which have characterized certain holding-company finance in the past." [Italics supplied.]

of these huge holding companies must not be allowed to pluck him again as reorganization managers.

Without prejudging Long Island's plan, it may be stated that the situation could all too easily have involved the typical management practice of using an absence of current dividends and a large amount of arrearages as devices to coerce public preferred stockholders into surrendering a large part of their due, in terms of assets, earnings and voting power, in return for the consent of common stockholders to the appropriation of current earnings for dividend purposes.[14]

Under state law, as the New York Commission candidly observed, the regulatory agency had—

> * * * no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected.

While the court below observed that the New York Commission had the duty to withhold approval unless it found that the plan was in the interest of investors (citing *Rochester Gas & Electric Co.* v. *Maltbie,* 284 N. Y. 626), this was,

[14] That the criticisms leveled at Long Island's plan by the New York Commission are typical in this regard, see the Report of the S. E. C. cited *supra*, fn. 11, p. 24.

as that Commission frankly conceded, a mere negative power to protect investor interests. When the preferred stockholders voted for the plan, they were confronted with only the Hobson's choice either to accept the management proposals or to wait indefinitely for the resumption of dividends. The State Commission was confronted with a similar choice either to approve a plan which it regarded as unfair or to leave the preferred stockholders in their existing dividendless condition. In this context, the State Commission's power to determine whether the plan was in the interest of investors was far less adequate to protect the preferred stockholders than the Securities and Exchange Commission's statutory power to *compel* such changes in the capital structure of a holding company as may be necessary or appropriate to effectuate the "fair and equitable" and "public interest" standards of the Act.[18]

When the preferred stockholders, by their complaint, directed the Commission's attention to

[18] See *Hottenstein* v. *York Ice Machinery Co.*, 136 F. 2d 944 (C. C. A. 3, 1943), indicating that under typical state law a preferred stockholder may have equitable relief against an unfair plan only upon a showing that the plan is so grossly unfair as to "amount to constructive fraud".

Cf. *Otis & Co.* v. *Securities and Exchange Commission*, No. 81, this Term. While this Court divided, as did the Commission, on the question whether the Commission had followed a proper method of determining what is "fair and equitable", in a liquidation of a solvent holding company,

Long Island's need for recapitalization, to the plan and to the State Commission's criticism thereof, the issue which they raised involved the applicability of one of the most important investor safeguards provided by the Act. In instituting the revocation proceedings, the Commission's notice and order for hearing emphasized the company's efforts to consummate the allegedly unfair plan as an important public interest consideration to be weighed in determining whether or not to revoke. Unless the Commission had power to preserve the status quo pending determination of this issue, its unquestioned jurisdiction to consider whether or not the exemption should be revoked [16] would prove meaningless.

Although the Commission assumed that Long Island had already taken all steps necessary under

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there can be little dispute that the result of the application of this standard by the Commission and the courts has been to give preferred stockholders far better protection than is available under state law. This has been the conclusion of disinterested commentators. See Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination* (1942), 29 Va. L. Rev. 1, 27–39; Dodd, *Fair and Equitable Recapitalizations* (1942), 55 Harv. L. Rev. 780, 796–806, 816; Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act* (1944), 57 Harv. L. Rev. 295.

[16] If the exemption were to be revoked in whole or in part, the Commission could thus make Section 11 applicable and proceed from that point to compel such changes in the security structure of Long Island as would be required to meet the "fair and equitable" and other standards of that section

the New York State Incorporation Law to effectuate the change in stockholders' rights contemplated by the plan, the plan was not yet a *fait accompli*. The same security instruments continued to evidence the entire "bundle of rights" of the existing preferred and common stockholders of Long Island, making it possible to restore the status quo in the event of a revocation of the exemption by the Commission and a finding that fairness and equity required the Commission to use the relative rights of stockholders antecedent to the plan as the basis for determining the equitable equivalent of their rights in any new plan which might be promulgated under the fair-and-equitable standard of Section 11. In the application of that standard the Commission might well conclude that the proper basis for evaluating the relative rights of Long Island's preferred and common stockholders in a new plan would be their respective rights as they existed at the time the Commission instituted the revocation proceedings, rather than those rights as precipitously altered pending the administrative determination. Even in a case which did not involve the fair and equitable standard this Court has suggested that an administrative proceeding for revocation of a license, not dissimilar to the proceeding here involved, is sufficiently analogous to a bill in equity for an injunction to make applicable the equitable

doctrine of *lis pendens*. See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 15–18. That case involved the issuance of a stop order to suspend, after hearing, a securities registration. Prior to hearing thereon the Court held that the situation was like a bill for an injunction in that "even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

But the ability of the Commission to find that it would be fair and equitable to ignore Long Island's effectuation of the changes provided in the plan, or that it would be feasible to do so without hardship to innocent security holders, was dependent on preventing intervening equities from arising. This meant prevention of trading in the new securities without actual knowledge of the issues involved in the Commission's proceeding. If the physical changes in Long Island securities, which would reflect rights as altered by the plan, should be made, it would be the natural expectation of investors upon receiving the new securities that the financial structure of the company as altered by the plan would continue unchanged—at least until change was made necessary by new financial conditions not foreseen. It would undoubtedly prove startling to many of them to learn

that the reorganization might be followed almost immediately by a new reorganization,[17] and still more startling to learn that the old security structure rather than the rights as altered by the plan could be the basis for the new structure. Trading in the new common stock would cause intervening equities in the purchasers to arise, and both buyers and sellers would be faced with the serious question whether the new common stock could or would in a later reorganization be separated so as to permit fair treatment to all security holders. For this reason, preferred and common stockholders alike would be subjected to the risk—gratuitously created by Long Island—that their respective rights might as a practical matter have to be readjusted in a later reorganization under the Act on a basis which would necessarily involve some element of hardship or inequity to at least some of the investors affected.

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[17] The feasibility standard of Section 77B and of Chapter X reflects an expectation that reorganization should not be a recurrent phenomenon in corporate affairs. As was said in *Price* v. *Spokane Silver & Lead Co.*, 97 F. 2d 237, 247 (C. C. A. 8, 1938):

"* * * it was not the intention of Congress in enacting § 77B to place crutches under corporate cripples, fit subjects for liquidation, and send them out into the business world to be a menace to all who might purchase their securities or deal with them on credit."

The Commission has held that the standards of the Holding Company Act reflect similar considerations. See *North Shore Gas Co.*, 10 S. E. C. 504, 521.

We submit, therefore, that the relief which the Commission was seeking was appropriate to prevent thwarting the duties of the Commission, to the public injury, and hence appropriate for consideration of a court of equity. In seeking to preserve the status quo pending hearing, the Commission was invoking one of the most ancient and traditional aspects of equity jurisdiction. The Commission was relying upon well-settled precedents upholding the inherent power of a court of equity to preserve a status quo pending proceedings before it or another tribunal. See *Babbitt* v. *Dutcher*, 216 U. S. 102; *Continental Illinois N. B. & T. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675–676; *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456 (C. C. A. 2, 1918). As this Court observed in the *Babbitt* case (pp. 110–111), in upholding the ancillary jurisdiction of federal courts in bankruptcy cases prior to the statute which expressly gave them that authority, the power does not depend upon the existence of specific authority, but is "the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. * * * a uniform system of bankruptcy, national in its character, ought to be capable of execution in the federal tribunals." For other illustrations of the exercise of ancillary equitable jurisdiction to preserve the status quo pending determination of rights in another tribunal, judicial or administrative, see *Un-*

derground Electric Rys. Co. v. *Owsley,* 176 Fed. 26 (C. C. A. 2, 1909) (appointment of a receiver to preserve the status of New York property of a decedent estate in probate proceedings before an Illinois state court); *United States* v. *Parrott,* Fed. Cas. No. 15998. See also *Olive Land & Development Co.* v. *Olmstead,* 103 Fed. 568 (C. C. S. D. Cal.); *Northern Pacific Ry.* v. *Soderberg,* 86 Fed. 49 (C. C. D. Wash.) (injunctions to prevent waste pending an administrative determination of title); *Wood* v. *Braxton,* 54 Fed. 1005 (C. C. D. W. Va.). Indeed, the Commission was merely asking the court to exert the traditional jurisdiction that Taney, C. J., employed in *Wartman* v. *Wartman,* Fed. Cas. No. 17210, where he held in contempt a litigant who sought by his acts to render moot, before an injunction could issue, the proceeding then pending before the court.

Two specific objections which the court below addressed to the existence of inherent federal equity jurisdiction in this type of case remain to be considered. In the first place, it held that the specific statutory remedies for certain types of cases under the Act negated any equitable jurisdiction for other cases. Secondly, it was the view of the court that the failure of the Commission to issue an administrative order taking jurisdiction over Long Island constituted a defect comparable to the failure to exhaust administrative remedies and precluded a court from taking jurisdiction upon the Commission's complaint.

The first difficulty which the court below found springs from the fact that Section 18 (f) of the Act gives a federal court jurisdiction at the suit of the Commission to enjoin only a "violation" of the Act or of a rule or order issued thereunder. Since the Commission made no charge that Long Island's attempt to frustrate the purpose of the administrative proceeding constituted in any literal sense a violation of the Act or of the Commission's rules or orders,[18] it was the court's view that this express grant of authority to seek the aid of the federal courts necessarily excluded injunctive relief upon grounds otherwise appropriate as a matter of general equitable principles. This argument gives no effect whatever to Section 25 of the Act, which provides, *inter alia,* that the federal courts shall have jurisdiction of suits in equity to enforce any "liability or duty created by" the Act. As the dissenting judge suggested, Section 25 and Section 18 (f) "chart the course" of federal jurisdiction to grant the relief sought by the Commission, although, of course, it is necessary to look to general

[18] A charge of "violation" would have raised the question of willfulness and the consequent applicability of criminal penalties provided by Section 29. While Long Island might be deemed to have "violated" the Commission's order for hearing by its precipitous action, the Commission did not wish to raise this question of criminality with respect to an interlocutory order and in advance of any administrative determination on the merits.

equity principles for the equitable duty, the violation of which makes Sections 25 and 18 (f) applicable. Whether or not it is concluded from these principles that Sections 25 and 18 (f) give the Commission a specific statutory right to the relief sought, we submit that these provisions afford no basis for any assumption that Congress intended to exclude the Commission from obtaining such relief. For that reason our principal argument here, as in the court below, is that the relief sought is one which falls within the general jurisdiction of the federal courts as courts of equity.

To apply here, as did the court below, the maxim *expressio unius, exclusio alterius,* together with substantive tax law distinctions between "avoidance" and "evasion", ignores the fact that the Commission's purpose in seeking equitable relief was to prevent precipitous action from circumventing the substantive policy of the statute and likewise rejects the congressional intention that this remedial legislation be liberally construed (Sec. 1 (c)). As this Court held in *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350, such an intention on the part of Congress clearly outweighs restrictive canons of statutory construction.

As further support for the argument that the particular form of circumvention here involved must have been intended by Congress to be beyond

the power of the Commission to correct, the court below suggested that it would be a negation of the grant of exemption for the company to be subject to the possibility of any restraint whatsoever prior to an effective revocation, saying, "it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform its capital structure" (R. 23). The court referred to the peril that "the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation without regard to the exigency nor to the effort and expense that may have been expended in formulation." This argument assumes an abuse of sound discretion both by the Commission in seeking, and an equity court in granting, injunctive relief. *Cf. Hecht Co.* v. *Bowles,* 321 U. S. 321.[19] The fact is that the Com-

[19] The assumption as to the probability of abuse of discretion by the Commission may perhaps be attributable to a misapprehension by the court below of the facts in the instant case. The majority opinion refers without warrant in the record to Long Island as "finding itself in a critical situation in respect to the maturity of its securities * * *" (R. 22). In fact, the contrary was shown affirmatively, after decision; the company's first mortgage debt was refunded in 1942 and does not mature until 1972, and its only other funded indebtedness consists of debentures which do not mature until May 1, 1956 (R. 37).

mission has not attempted to exercise any continuing surveillance over exempt companies and, even where it has had occasion to deny exemption, has frequently postponed the effective date of its orders in order to facilitate a rearrangement of corporate affairs free of complications under the Act where this would not prejudice the public or private interests which it is the duty of the Commission to protect.[20] Indeed, the very possibility of resort to equitable remedies to prevent unforeseen abuse of the exemption before formal revocation proceedings can be completed, makes possible a more liberal exercise of the Commission's exemptive powers than would otherwise be possible. If the holding of the court below should be affirmed, it may well be the duty of the Commission, without awaiting specific threat of abuse, to hedge exemptions with restrictions which would preclude any possible abuse that can be foreseen. Inflexible interpretation of the administrative and enforcement provisions of the Act would seem to be as undesirable from the point of view of holding companies who may be entitled to some exemption, as from the point of view of the public and investor interests sought to be protected by the Act, making it necessary to burden companies

[20] See *H. M. Byllesby & Co.*, 6 S. E. C. 639, 658–660 (1940); *Cities Service Company*, 8 S. E. C. 318, 338 (1940); *Standard Oil Company of New Jersey*, Holding Company Act Release No. 3312 (1942).

which do not seek to abuse the grant of exemption with restrictions designed to reach the less scrupulous.

The second objection of the court below—that the Commission was premature in its application for judicial aid—is actually a broader statement of the objection already considered. The court relied on *Board of Railroad Commissioners* v. *Great Northern Railway*, 281 U. S. 412, in which this Court held that a federal court has no jurisdiction at the suit of a railway to enjoin intrastate rates, as reduced by order of a state commission, pending proceedings before the Interstate Commerce Commission to determine the validity of the rates. That case differs markedly from this. That case rested largely on the traditional reluctance of the federal courts, confirmed by the pattern of the Interstate Commerce Act, to interfere with the power of a state to fix intrastate rates. The order of the state commission in that case was mandatory, whereas in the present case the decision of the New York Commission was purely permissive and arose on the voluntary application of respondent for a license to carry out its plan. Approval of the plan by the state commission did not compel its precipitous execution, and, as the dissenting judge below suggested (R. 27), the action of the New York commission was "almost a direct invitation or appeal to the Securities and Exchange Commission to afford the relief the state agency

cannot." Moreover, in the *Great Northern Railway* case, the Interstate Commerce Commission was not itself seeking to protect its jurisdiction; indeed, an outstanding order of that Commission provided that the intrastate rates in force should "continue in force and effect until revoked, modified or superseded by appropriate lawful proceedings before said board [the state commission]" or "as otherwise provided by law." 281 U. S. 417.

Apart from the novelty of interposing the doctrine of exhaustion of administrative remedies as a barrier to protection sought by the agency itself, there is a question, left unresolved by the court, whether any adequate administrative remedy existed. As the Commission pointed out in its brief in the court below, it did not overlook the possibility of itself issuing a summary order under the residual power conferred upon it by Section 20 (a) of the Act to issue such orders as may be deemed "necessary or appropriate to carry out the provisions of this title." Section 20 (c) provides that orders under the Act "shall be issued only after opportunity for hearing," and while we should regard an abbreviated opportunity appropriate to a summary order designed only to preserve the *status quo*, it is not so clear that the Commission would be authorized to issue, without any opportunity for hearing at all, the equivalent of an *ex parte*

temporary restraining order. Under the circumstances of the present case, it was necessary to obtain an immediate restraint and, therefore, only an *ex parte* restraining order would suffice. As to the necessity for a preliminary administrative determination before seeking judicial relief, there could be no difference between the issuance of an *ex parte* order, followed by the bringing of a suit to enjoin violation of that order, and the determination of the Commission to seek equitable relief, followed by instructions to its counsel to proceed accordingly. The dissenting judge expressed the opinion that the Commission had in fact acted to the full extent presently appropriate (R3[illegible]—), and the majority of the court below did not indicate that the Commission could have taken any further action without the hearing which the company's precipitous action had precluded.

While the Commission does regard issuance of its own *ex parte* order followed by a suit to enjoin any threatened violation of that order as a possible alternative to the procedure which it pursued in this case,[n] it has seemed to it more

[n] Cf. *North American Company*, 9 S. E. C. 617 (1941), where the Commission, after a summary hearing and a finding that the proposal of a registered holding company to invoke state court dissolution proceedings was itself a violation, issued an order directing the company not to proceed with the plan and forthwith made application to a district court to enjoin threatened violations which included

consonant with traditional doctrines concerning division of powers to rely upon the courts rather than the administrative agency itself for such interlocutory relief, at least in the absence of a more specific indication of the intention of Congress than is found in Section 20. Issuance of such an order by the Commission would subject the company to the risk of criminal sanctions for violation. This circumstance might well have precipitated the case into a circuit court of appeals on a petition of the company for review, accompanied by an application for a stay of the order pursuant to Section 24 (b), which would have raised essentially the same issues of discretion as would be involved in the exercise of jurisdiction by the district court over the complaint filed by the Commission.

In addition, it seemed to the Commission more consonant with the respective functions of the circuit courts of appeals (which have jurisdiction only to review Commission orders), and the district courts (which have original equity jurisdiction at the suit of the Commission), to impose on the latter the burden of weighing equities incident to a determination of whether

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the threat of the company to violate the new administrative order. The company agreed to await the decision of the district court before proceeding with the plan, and the action was later dismissed pursuant to stipulation upon abandonment of the proposed dissolution.

the *status quo* should be maintained where on no theory of procedure would the circuit court of appeals have had before it an administrative order on the merits. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

If the Commission was wrong in assuming that it was inappropriate to issue its own interlocutory restraining order under the circumstances, nevertheless we submit that the dissenting judge was correct in concluding that the instructions to Commission counsel to bring a suit were the substantial equivalent of such an order, and at most, since respondent could not have been prejudiced by the omission, the court should have held the case to await a formal order. If, on the other hand, the Commission was right in concluding that no further administrative action was presently appropriate then it follows that the doctrine of exhaustion of administrative remedies could have no application.

II

The District Court had jurisdiction as a federal court

While both courts below denied that the District Court had jurisdiction as a federal court, it was not intimated that a state court would have any greater jurisdiction and we submit that once it is established that the complaint stated a proper cause for equitable jurisdiction it cannot be ques-

tioned that such equitable jurisdiction is properly cognizable in a federal court.

The Commission's complaint invoked the general equity powers of a federal district court which extend, under Section 24 (1) of the Judicial Code, to "all suits of a civil nature, at common law or in equity." Under that provision this case may be sustained as an action brought by the United States[22] or by an officer thereof authorized by law to sue," or as involving a federal question, or as a suit arising under a law

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[22] Although the court below rejected jurisdiction under Section 24, it did not intimate that the difficulties which it found with the Commission's case could be cured by a suit filed by the Department of Justice on behalf of the United States, or by the Commission in a state court, or by the preferred stockholders suing in a state or federal court. It is our view that the Act contemplates that the Attorney General shall have responsibilities for criminal proceedings and that civil suits are to be brought by the Commission. Cf. *Securities and Exchange Commission* v. *Collier & Co.*, 76 F. 2d 939 (C. C. A. 2, 1935). The dissenting judge below intimated that preferred stockholders might have had an independent standing to sue by analogy to the cases which have recognized private standing to sue for damages under other statutes administered by the Commission (R. 32). We deem it unnecessary to express any opinion on this point. Whether or not individual security holders can sue, it is clear that Congress looked primarily to the Commission as the enforcement agency for the protection of the interest of investors, and it can scarcely be doubted that if the preferred stockholders had attempted to obtain equitable relief, Long Island would have objected that the right of action, if any, was in the Commission.

[23] This was the view of the dissenting judge below.

regulating commerce.[24] The equitable precedents relied on to show that this is an appropriate case for the issuance of an injunction to preserve the status quo indicate as well that Long Island was under an equitable duty not to disturb the *status quo*. This duty, in turn, affords a basis for federal jurisdiction under Section 25 of the Act.

III

The Commission has standing to sue for equitable relief to aid the public investors and protect the Commission's processes

The related argument that the Commission lacks standing to sue in this case reflects, we submit, an over-narrow view of the relations between the judiciary and the administrative agencies of the federal government in the performance of their respective functions. If the Holding Company Act had not lodged in the Commission the primary responsibility for protecting the public interests but, instead, had left those interests to be protected at the suit of private parties, it could hardly be questioned that a court would have

[24] The Holding Company Act is, of course, a federal law regulating interstate commerce. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. See *Stark* v. *Wickard*, 321 U. S. 288, 290, n. 1, holding that a district court has implied power to consider a suit challenging administrative action under the Agricultural Marketing Agreement Act of 1937 in the absence of any express provision for judicial review of the order in question.

jurisdiction to preserve the status quo pending the outcome of proceedings before it to determine whether, as here, an exemption should be revoked. Indeed, even under the existing scheme of the Act, if the Commission should refuse to revoke Long Island's exemption and it should be held that the complaining preferred stockholders were "persons aggrieved" entitled to petition for review under Section 24 of the Act, it would seem clear that the reviewing court would have power to preserve the *status quo* pending the review proceeding."[25] And again, it may well be that even in the present situation Long Island's preferred stockholders would be entitled to equitable protection, including the issuance of a temporary restraining order, against the threatened hazards of Long Island's actions. The dissenting judge below intimated that they were entitled to such relief upon their own complaint (R. 32) "under the implications of the Act itself, just as has been held with re-

[25] See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. The problem of when an administrative agency should be regarded as the sole guardian of the public interest and related private interests is one to which the courts have given divers answers in the contexts of particular statutes. See *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. C. A. 2), dismissed as moot, 320 U. S. 707. Cf. *American Power & Light Company* v. *S. E. C.*, No. 470, this Term; and *S. E. C.* v. *Okin*, No. 815, this Term. The Commission and the courts have never had occasion to consider whether security holders have standing to review an order granting or refusing to revoke an exemption from the provisions of the Act.

spect to other acts administered by the S. E. C."[28] The majority of the court below neither challenged nor indicated acquiescence in this view but denied that the Commission, even though charged with primary responsibility for protecting the interests of Long Island's preferred stockholders, had standing to seek this relief on their behalf.

A compelling precedent for the right of an administrative agency to seek judicial aid for the protection of its primary or more comprehensive jurisdiction is *S. E. C.* v. *United States Realty and Improvement Co.*, 310 U. S. 434. There, as in this case, this Commission was obliged to resort to a statutory procedure wherein it had no express standing in order to protect its jurisdiction under its own statute.

In the *Realty* case, the debtor, a corporation having liabilities in excess of $3,000,000 and many public security holders, undertook to reorganize under Chapter XI. The Commission sought to intervene, alleging that Chapter X prescribed the exclusive procedure for the reorganization of corporations having securities in the hands of the public. After comparing the procedures prescribed by Chapters X and XI, this Court held that the safeguards provided for public security holders by Chapter X could not be circumvented by the debtor's resort to Chapter XI. In so holding, Mr. Justice Stone said for this Court (310 U. S. at 458–459):

[28] See note 22, p. 44, *supra*.

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent.

The court below sought to distinguish the *Realty* case on the ground that the Chapter XI court had, by virtue of the pendency of the proceeding, exclusive jurisdiction of the debtor and

its property, which could be exercised through dismissal of the proceedings, and permitting the Commission to intervene as a party was merely an appropriate method of exercising that jurisdiction, adding that the right to intervene does not imply a right to bring an original suit." But the

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" The court cited, in this connection, *Sprunt & Son* v. *United States*, 281 U. S. 249, 255; *P. & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479, both of which turn upon special statutory provisions, not on Rule 24 of the Rules of Civil Procedure which was the basis for intervention in the *Realty* case. On this point the dissenting judge stated (R. 30, n. 8):

"It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486, as follows: 'The mere fact that appellant was permitted to intervene before the Commission does not entitled it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it*.' [Italics added.] So the reference in the *U. S. Realty* case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See *Commercial Cable Staffs' Ass'n* v. *Lehman*, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, *Nature of Permissive Intervention under Rule 24b*, 3 Fed. Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 Yale L. J. 65."

Realty case recognized the Commission's standing to sue and to appeal from an adverse order in the Chapter XI proceeding notwithstanding the fact that its only express interest was a statutory right to become a party to a Chapter X proceeding without right of appealing, while Chapter XI was wholly silent as to the status of the Commission.

It was because any order in the Chapter XI proceeding which would have enabled the debtor to adjust its obligations under that part of the Bankruptcy Act, would have conclusively impaired the exercise of the Commission's functions under Chapter X and would have had an equally conclusive effect on the public investors in the debtor who would have been deprived of the beneficial protection of Chapter X, that a remedy was sought and found in the broad legislative purpose of the two Chapters.[28]

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[28] In the *Realty* case the Circuit Court of Appeals for the Second Circuit (108 F. 2d 794), Judge Clark dissenting, made almost precisely the same argument against the Commission's standing there as was advanced by the majority of the court below here, saying (at p. 797):

"The Commission argues that in order to protect its right to intervene in a Chapter X proceeding it must be allowed to intervene in any Chapter XI proceeding which it believes ought properly to have been brought under Chapter X. But this proceeds upon the false premise that the Commission has a present right to protect. It has no such right. Its only right is to intervene *if* a Chapter X proceeding is pending. Until such a proceeding is instituted, the Commission has no interest whatever to protect." [Italics supplied.]

Among the cases cited by this Court in the *Realty* case, in support of the Commission's standing to seek judicial relief appropriate to the maintenance of its statutory authority and the performance of its public duties, was *In re Debs*, 158 U. S. 564—a case which the dissenting judge below characterized as "a still broader assertion of federal power and duty." In the *Debs* case this Court sustained the right of the Government to seek the aid of the federal courts, and the inherent equity power of the courts to give that aid, saying (at p. 584):

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

The use of judicial powers to safeguard public interests which are entrusted to the guardianship of an administrative agency is consonant with recent decisions of this Court marking the growth of the federal administrative agencies as instruments for the more effective performance

of executive duties in the public interest and emphasizing the necessity for harmonious interplay of functions on the part of both agencies and courts." Thus, in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15, in dealing with a situation closely analogous to the present one this Court sustained the implied and inherent power of reviewing courts to preserve the status quo (even though no private property rights were threatened) in order "to save the public interest from injury or destruction" during the pendency of an appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States* v. *Morgan*, 307 U. S. 183, 190–91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." And as this Court pointed out in the *Morgan* case, *supra*, at p. 191:

> * * * court and agency are not to be regarded as wholly independent and un-

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[*] Rejecting this conception of the proper relationship between courts and administrative agencies, the majority of the court below viewed the Commission as a creature of limited power which the courts will aid only where and to the extent that Congress has expressly required them so to do.

related instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.[20]

CONCLUSION

The judgment of the court below should be reversed and the case remanded to that court for remand to the district court with instructions to take jurisdiction of the Commission's complaint and entertain the Commission's motion for a preliminary injunction on the merits. The restraining order of this Court, which continues

[20] This statement was recently quoted in full in *Hecht Company* v. *Bowles*, 321 U. S. 321, 330, as a standard applicable to the exercise of equity jurisdiction in granting equitable relief at the suit of a governmental agency.

only pending the issuance of the mandate, should be extended until further order of the district court in compliance with the mandate.

Respectfully submitted.

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APRIL, 1945.

APPENDIX

The Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79 et seq., provides in pertinent part as follows:

SECTION 1 * * *

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-

utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application here-

under in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon

application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection

with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

* * * * *

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

SEC. 18 * * *

* * * * *

(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

SEC. 20. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title.

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought

in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

—against—

LONG ISLAND LIGHTING COMPANY.

BRIEF OF LONG ISLAND LIGHTING COMPANY IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER.

There is little to add to the opinions of Circuit Judges Simons and Hutcheson, contained in Appendix A hereto, and not yet officially reported.

Because of its exclusively intrastate character Long Island Lighting Company (hereinafter referred to as Long Island) applied for and obtained an order from petitioner exempting it from every provision of the Public Utility Holding Company Act. As occasion arose for the making of necessary changes in its capital structure and after the approval of all classes of its stockholders, Long Island, pursuant to the requirements of the Stock Corporation Law and the Public Service Law of the State of New York, submitted the proposed plan to the Public Service Commission of the State of New York for approval. This was the only tribunal having any jurisdiction whatever in the matter. After the proceeding had been pending several months before the New York Public Service Commission, and after extensive public hearings

on the plan had been concluded, petitioner gave notice of a hearing before petitioner to consider the subject of revocation of the order of exemption.

Contrary to the statement made in petitioner's application there are no "pending administrative proceedings instituted by the Commission, * * * to determine whether a recapitalization plan, challenged as contrary to the fair-and-equitable and public-interest standards of the Holding Company Act, should be subject to those standards". The only administrative proceeding now pending in which Long Island is respondent is the aforesaid proceeding to determine whether the previously granted order of exemption shall be revoked.

Prior to the hearing before petitioner, the New York Public Service Commission issued an order approving the plan. Upon the filing of the order, together with the certificate of recapitalization, with the New York Secretary of State the new plan became at once legally effective. Each step taken by Long Island was strictly in accordance with law and there is no claim that anything done by Long Island or by the New York Public Service Commission constituted any violation of any order, rule or regulation of petitioner or any provision of the Public Utility Holding Company Act or any other statute.

The relief prayed in the pending proceeding in equity is for a temporary and permanent injunction restraining Long Island from performing certain mechanical acts recognizing the consummation of the said plan of recapitalization. These mechanical acts have to do with the distribution of new shares, the over-printing of certain existing certificates and the making of a large number of book entries relative to certain depreciation and other items as directed by the New York Public Service Commission.

No claim is made that petitioner or any other body or tribunal now has jurisdiction to alter the plan now in

effect. As stated by District Judge Kennedy in his opinion:

> "It [Long Island] has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote."

At the time the plan thus became effective, and at all times thereafter, petitioner was and is wholly without jurisdiction to pass upon the plan or to take any action whatever in relation thereto. This proceeding was brought by petitioner wholly upon the hypothesis that at some future date petitioner might, after a hearing and consideration of the evidence: revoke the order of exemption; find that Long Island, contrary to all appearances, was in some way engaged in interstate commerce; require that Long Island register under the Public Utility Holding Company Act; and entertain a proceeding under Section 11 of the Act to inquire into the existing capital structure. As stated by Circuit Judge Simons:

> "This it has not done, and may never do."

The so-called interesting public questions referred to in the petition for certiorari, relative to petitioner's application to Long Island's corporate structure of petitioner's "simplification standards" and its "fair and equitable standard", are thus not now presented and may never be presented. As further stated by Judge Simons:

> "The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge."

Any interference by the courts at such a time would inevitably impair the powers and jurisdiction of state instrumentalities which is specifically ruled out by Section 21 of the Act and by USCA Title 28, Sec. 379.

Accordingly, the simple inquiry which the courts below have made herein was whether, under the circumstances above related, petitioner was authorized by law to seek the relief requested and the courts authorized by law to grant it. Petitioner's powers are those and those only which the Congress has chosen to give it and the same is true of the District Courts.

I.

That the Congress never intended petitioner to have any such extraordinary and unnecessary power as the power to invoke the aid of equity in support of a presently non-existent and wholly speculative jurisdiction *in futuro*, and that the Congress never intended to confer upon the District Courts the power to entertain any such applications is demonstrated beyond peradventure of doubt in the short concurring opinion of Circuit Judge Hutcheson.

When, as and if there shall be some violation by Long Island of some order, rule or regulation of petitioner or a violation of some provision of the Public Utility Holding Company Act, it will be found that the Act contains ample and sufficient provisions for resort to the courts by applications for injunctive relief and otherwise.

II.

Petitioner has wholly failed to present any reasonable basis for the jurisdiction which it asserts to exist.

Neither the petition for certiorari herein nor the dissenting opinion of Circuit Judge Clark contain any statement of reasons which could fairly be said to support petitioner's contention.

As pointed out by Circuit Judge Simons, *Securities and Exchange Commission* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, has no bearing upon the situation now presented. In that case the District Court had undoubted jurisdiction of the proceeding pending before it under one of the chapters of the Bankruptcy Act and the intervention by petitioner was in strict accordance with Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by Par. 37 of the General Orders in Bankruptcy.

The claim that this proceeding is a proceeding "brought by the United States or by any officer thereof authorized by law to sue" is fanciful and requires no comment. It is significant that this contention, which was so strongly urged in the courts below, is conspicuous by its absence from the petition now before this Court.

The substance of the dissenting opinion by Circuit Judge Clark appears to be that he thought it would have been a wiser policy for Long Island to refrain from raising the questions of jurisdiction and power and that he was hopeful that, pending the coming down of the mandate in the Circuit Court, petitioner might assume the responsibility of itself issuing some form of injunctive order, while at the same time the complaining stockholders might bring an equitable proceeding of their own, provided they could establish the necessary diversity of citizenship.

As was the case in the oral argument before Mr. Justice Jackson on the application for a temporary restraining order, many arguments are presented based upon various aspects of the plan of recapitalization and other matters not now relevant, but little or nothing said to support on the merits the claim that the District Court had a jurisdiction which both the United States District Judge and the Circuit Court of Appeals for the Second Circuit have denied.

III.

It is our understanding that petitioner's application for a temporary restraining order will come before this Court together with the application for certiorari.

Despite the complete lack of jurisdiction in the District Court herein, Long Island has been enjoined by a series of temporary restraining orders. Finally, the Circuit Court of Appeals refused to grant a further temporary restraining order during the pendency of petitioner's application for certiorari, but did grant such an order for the brief period of five days pending the making of such an application to one of the Justices of this Court. Thus for over three months, despite the conceded fact that the plan of recapitalization is in full legal effect under New York law, Long Island has remained a corporation wholly without stockholders and in a position which daily becomes more precarious. The imminence of its annual stockholders' meeting and the grave danger of a default under both of its existing bond issues, together with the hazard of some unforeseen and unexpected new development devised by the ingenuity of some of its former stockholders need no elaboration.

Despite the repeated assertions that proceedings before petitioner may prove "nugatory" and that the consummation of the plan may "make moot important objectives of the proceeding before the Commission", the undoubted fact is that the powers of petitioner under Section 11 of the Act, should petitioner revoke the order of exemption, find that Long Island was engaged in interstate commerce, require registration under the Act, and finally obtain and assert jurisdiction to inquire into Long Island's capital structure, will be wholly effective within the limits prescribed by the statute. As stated by Circuit Judge Clark in his dissenting opinion:

"Whatever this court does, indeed whatever may be

the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide —if necessary, in a new proceeding and under another section of the statute—will still exist."

Apparently what petitioner complains of is the circumstance that, in some future proceeding under Section 11 of the Act, petitioner will have to consider Long Island's capital structure not as it existed prior to the order of the New York Public Service Commission, but its capital structure as altered by the action taken by the New York Commission. But this is something which cannot be avoided, in any event. The new capital structure, as has already been stated, is now in full force and effect and cannot now be altered.

CONCLUSION.

The application for a temporary restraining order and the application for writ of certiorari should both be denied.

Dated: New York, N. Y., March 22nd, 1945.

Respectfully submitted,

HAROLD R. MEDINA,
Counsel for Long Island Lighting Company.

CHARLES G. BLAKESLEE,
CHARLES E. ELBERT,
JOHN J. DONOHUE,
RICHARD T. DAVIS,
Of Counsel.

APPENDICES.

APPENDIX A.

(Opinions of C. C. A.)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 233—October Term, 1944.

(Argued January 15, 1945 Decided February 23, 1945.)

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

—*v.*—

LONG ISLAND LIGHTING COMPANY,

Appellee.

Before:

HUTCHESON, SIMONS and CLARK,

Circuit Judges.

Appeal by the Securities and Exchange Commission from an order of the District Court for the Eastern District of New York denying appellant's motion for an injunction enjoining appellee from carrying out a plan of recapitalization approved by the Public Service Commission of New York. Order Affirmed.

HAROLD R. MEDINA, CHARLES G. BLAKESLEE, CHARLES E. ELBERT, JOHN J. DONOHUE, RICHARD T. DAVIS, of counsel for appellee.

ROGER S. FOSTER, Solicitor; MORTON E. YOHALEM, Counsel, Public Utilities Division; DAVID K. KADANE, Special Counsel, Public Utilities Division; THEODORE L. THAU, Special Counsel; HARRY G. SLATER, SOLOMON FREEDMAN, for the Securities and Exchange Commission.

On brief as *Amici Curiae*:
MILTON POLLACK for preferred stockholders.
WILLIAM A. LOCKWOOD for New York Curb Exchange.

SIMONS, *Circuit Judge:*

The appellant sought temporary and permanent injunctions restraining the appellee from consummating a plan for its recapitalization until determination of proceedings pending before the Commission, involving the status of the appellee under the Public Utility Holding Act of 1935, 49 Stat. 803, 15 U. S. C. A. §78 (a) *et seq.* The District Court denied the preliminary injunction on the ground that it lacked power to grant the relief sought. A temporary restraining order pending hearing, having been dissolved, a judge of this court granted a temporary restraining order pending hearing on the appeal.

The Commission sought protection by the District Court in the carrying out of duties asserted to devolve upon it under the Public Utility Holding Act, by enjoining the appellee from taking further steps to effectuate a plan of recapitalization, until in an administrative proceeding before it, it was determined whether rights sought to be affected by the plan should be subjected to the reorganization standards of §11 of the Act. The specific action sought to be enjoined is the overprinting of existing cer-

tificates for preferred stock and the issuance of new common stock, and the nature of the relief sought is the preservation of the *status quo*.

The appellee is a holding company as defined in §2(a)(7) of the Act, but exempt from the registration and regulatory provisions of the Act by an order of the Commission dated March 27, 1936. That order is, by its express terms, subject to revocation after hearing and a finding by the Commission that the circumstances which gave rise to its issuance no longer exist. The exemption is authorized by §3(a) of the Act and may be revoked in pursuance of §3(c).

On November 4, 1944, a petition was filed with the Commission by the preferred stockholders of the appellee, which led to the institution of proceedings by the Commission on November 10, to determine whether the exemption should be in whole or in part revoked. The stockholders represented that the appellee was endeavoring to effectuate a recapitalization plan unfair to them and had engaged in activities which burdened interstate commerce and the means and instrumentalities of interstate commerce. On November 21, 1944, the Commission instituted a separate proceeding under §2(a)(7)(B) of the Act, for the purpose of determining whether certain persons or corporations owning or controlling substantial amounts of outstanding common stock of the appellee, exercised such a controlling influence over its management or policies as to make it necessary, in the public interest and for the protection of investors or consumers, that the appellee be subjected to the obligations, duties, and liabilities imposed by the Act. On November 22 the two proceedings were consolidated and a hearing ordered for December 19, which, for reasons presently appearing, was not held. It is asserted that if it should be determined that the exemption granted to the appellee be revoked or modified, the consequence would be that the promulgation and consummation of the plan of recapitalization would then be

subject to the jurisdiction, scrutiny, and approval of the Commission under the applicable standards of the Act.

On December 18, prior to the date set for hearing, it came to the Commission's attention, through the press, that the appellee was undertaking to consummate a plan under New York law without awaiting a determination whether it would be permitted to continue to enjoy its exemption, or whether it would be required to register as a holding company, or be subjected to the supervision of the Commission, and the present proceeding was at once begun to restrain such consummation.

Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to requirements of the Stock Corporation Law and the Public Service Law of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors. *Rochester Gas & Electric Corp.* v. *Maltbie*, 284 N. Y. 626. The appellee promptly filed its certificate of recapitalization together with the order of approval, in the office of the Secretary of the State of New York, in pursuance of the Stock Corporation Law. The plan became effective upon such filing (General Corporation Law, §8), the rights of the stockholders under the corporate structure thereupon came to an end, trading in the old stock ceased on the New York Curb Exchange on December 16, and trading in the new stock commenced on December 18. On December 19 the appellee was ordered to show cause why a preliminary and permanent injunction should not be entered restraining it from carrying out the recapitalization plan, and concurrently the temporary restraining order issued. Because of it and the order out of this

court compelling further restraint pending hearing on appeal, the appellee says it is now a corporation without stockholders and unable to do any of the things which, by state law, require the approval of stockholders.

The court, without determining whether a case had been made out for equitable relief by a showing of irreparable harm if the injunction should be withheld, and without considering whether state law provided a remedy to the preferred stockholders which they failed to invoke, denied the relief sought solely upon the ground that the Commission was without power, conferred upon it by the Act, to seek, and the court without power, because of limitations upon its jurisdiction, to grant it.

The Commission bases its appeal mainly, if not solely, upon the asserted legal principle that a federal court has power, upon the application of an administrative agency before which an administrative proceeding is pending, to preserve the *status quo* until such proceeding is concluded. The necessity for the preservation of such status is sought to be demonstrated by argument that if further steps are taken by the appellee to consummate its recapitalization plan, the rights of preferred stockholders will be broken up into new preferred and common shares in distributable form, and it might become impossible to adjust their rights on a basis which would adequately reflect existing equities. Trading in the new common stock would cause intervening equities in the purchasers to arise, and there would be serious doubt that the new stock could once more be separated so as to permit fair treatment to all security holders. In any event, trading in Long Island securities would be upon a misleading basis and there would be substantial difficulties in achieving the fair and equitable result contemplated by the Act.

The Commission asserts, however, that it does not rely for its authority to seek relief, upon any specific grant of the statute. It disclaims reliance upon §18(f) as a basis for the jurisdiction of the court, for that section grants it

authority to bring an action in a proper district court of the United States only for acts or practices which constitute or will constitute a violation of the provisions of the Act, or of any rule, regulation, or order thereunder, and it concedes there have been no such violations. It plants itself squarely upon the general equity powers of District Court under §24 of the Judicial Code which extend, *inter alia*, to all suits of a civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue. In support of its position it argues that the various branches of the federal government have certain implied and inherent powers which will be exercised, where appropriate, to protect the proper functioning of another branch of the government, that preservation of the *status quo* pending determination, is a traditional aspect of equity jurisdiction, and that the circumstances of the present case amply warrant its exercise to prevent circumvention of the Commission's jurisdiction under the Holding Company Act. It deems it an unnecessary refinement to determine whether particular cases relied on rest upon the fact that the action is brought by the United States or by an officer thereof authorized to sue, or upon the existence of a federal question, or upon the ground that the case falls within §24(8) of the Judicial Code applicable to "all suits and proceedings arising under any law regulating commerce". In seeking injunctive relief the Commission asserts it is asking the court to exercise the same kind of jurisdiction which a federal court would employ to protect its own jurisdiction, and to preserve a *status quo* pending proceedings before another tribunal.

The cases relied upon, however, which sustain the right of a federal equity court to preserve a *status quo* pending proceedings before it or another tribunal, are mainly those in which restraint is sought to protect a jurisdiction otherwise acquired. Such are the bankruptcy cases, typified by *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co.*,

294 U. S. 648, and equity receivership cases, such as *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. (2d) 456 (C. C. A. 2). No case has been cited to us, and none has been found, where a federal court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise.

The Commission leans heavily upon *Securities & Exchange Commission* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, as a compelling precedent. There the respondent brought reorganization proceedings under Chapter XI of the Bankruptcy Act. Chapter X also provides for reorganization, but permits participation by the Securities & Exchange Commission in proceedings in the District Court. The Commission was allowed to intervene in the Chapter XI proceeding on the ground that it is charged with the performance of important public duties under Chapter X, which will be thwarted if a debtor may secure adjustment of his debts under Chapter XI. The Court found that the Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interference with their performance through improper resort to Chapter XI proceedings in violation of the public policy of the Act which it is the duty of the court to safeguard. Such permissive rule of procedure was found to be Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by para. 37 of the General Orders in Bankruptcy. By it a party may be permitted to intervene in an action when its claim or defense and the main action have a question of law or fact in common. This provision dispenses with any requirement that the intervenor shall have a direct, personal, or pecuniary interest in the subject of the litigation.

The right to intervene, however, does not imply a right to bring an original suit, *Sprunt & Sons* v. *U. S.*, 281 U. S. 249, 255; *P. & W. Va. Ry. Co.* v. *U. S.*, 281 U. S. 479. In the *U. S. Realty Company* case jurisdiction of the court was originally invoked in the exercise by it of the bankruptcy power conferred upon a court of bankruptcy by §§74, 75, and 77 of the Act of March 3, 1933, to which Chapters X and XI have succeeded. Under those sections, if the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located, and it is not necessary to its validity that the proceedings should result in an adjudication of bankruptcy. *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co., supra.* It is, of course, established doctrine that a federal court, having first acquired jurisdiction of the subject matter, may enjoin parties from proceeding in other courts where the effect of the action would be to defeat or impair the jurisdiction of the federal court, *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 229, but we fail to perceive its aid to the Commission, even though it extends to the protection of proceedings before an administrative tribunal.

The subject matter involved in the Commission's proceeding, was a determination whether to take jurisdiction over Long Island. It had previously exempted it. To say that it was seeking to protect a jurisdiction, which once it had renounced and was now undertaking to regain, is a contradiction in terms. The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge. It has no jurisdiction over Long Island to be protected, and may draw such jurisdiction to itself only by a finding, after hearing, that circumstances which gave rise to the exemption, no longer exist, and by the

promulgation of an order of revocation. This it has not done, and may never do.

Pennsylvania v. *Williams*, 294 U. S. 176, is urged upon us as authority for holding that a governmental agency may have judicial aid by a stay of judicial proceedings which would interfere with its administrative functions. There the state intervened in a receivership proceeding in a federal court, praying that federal receivers be required to surrender the assets of a corporation to a state agency for liquidation under state law. The court required the District Court to discharge its receivers and direct them to surrender the property to the state commission which had commenced proceedings for the winding up of the association, under state law. This is again an intervention ancillary to validly acquired jurisdiction over the property of the association. We do not perceive it to be authority for a holding that in this case the court should have interfered with the action of the New York Commission at a time when the appellant was without jurisdiction over Long Island. Moreover, the *Williams* case points out that it has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of state courts where its exercise would involve control of or interference with the internal affairs of a domestic corporation, and that there are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers, citing *Matthews* v. *Rogers*, 284 U. S. 521, 525. This is but another aspect of the doctrine that federal courts will carefully observe constitutional limitations upon their jurisdiction, and avoid unnecessary interference with state action. The principle is illuminated for present purposes by *Board of Railroad Commrs.* v. *Great Northern Ry. Co.*, 281 U. S. 412, where it was held that under the Interstate Commerce Commission Act the courts have no authority to prevent a carrier, by injunction, from putting into effect allegedly unfair intrastate rates until the Commission

has a chance to determine their validity. "A judicial restraint of the enforcement of intrastate state rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created". It was also said that "the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission". It would seem, therefore, that the court in the present case may not interfere with the domestic affairs of a state corporation seeking reorganization or recapitalization under state law, until by formal action of the Commission it was brought within the jurisdiction of the Act which alone created the Commission, and from which it alone derives authority.

While the Commission does not base its suit for relief upon any express authority conferred upon it by the Act, but rests its case upon the general equity powers of a federal court, it is not without importance that, by the terms of the Act which purport to provide for a comprehensive scheme for control of practices by public utility holding companies and affiliates affected with a national public interest, the Congress conferred upon the Commission in §18(a) and §11(d), the power to invoke the aid of the courts only to prevent evasions of the Act and noncompliance with the orders of the Commission. There is concededly no power to restrain or discipline holding companies exempt from its provisions. It would seem, therefore, that the guide to statutory construction in the maxim *expressio unius exclusio alterius,* is applicable. Express

powers are generally construed to be in negation of powers not expressly granted, and the application of the maxim here is not such an unwarranted use thereof as it was found to be in the *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co., supra,* where it required other provisions of law to be ignored.

The appellee was exempted from the provisions of the Public Utility Holding Company Act; it has violated no law; it has disobeyed no order or regulation of the Commission. Finding itself in a critical situation in respect to the maturity of its securities, and in need of some change in its corporate structure, it applied for relief to the only agency authorized to grant it, namely, the Public Service Commission of the State of New York, with the sanction of its stockholders. There is no contention that it acted unlawfully; there is no requirement of law that obliged it to advise the appellant of the proceedings before the New York Commission, or of that body's favorable action upon its application. That its endeavor was precipitous may or may not have been in pursuance of its need—of that we are not advised. The Commission says that it did not overlook the possibility of its issuing a summary order under the residual powers conferred upon it by §20(a) of the Act, giving it authority from time to time to issue, amend, and rescind its rules and regulations, but that it seemed to it more consonant with traditional doctrines to rely upon the courts rather than upon an administrative agency itself for interlocutory relief, and advises us again and again that it has been careful not to prejudge the merits of the plan. It asserts, nevertheless, that the basis for its application for equitable relief was the conviction that a very serious question is presented as to whether the plan conforms to standards of the Act designed to protect the public interest, and alleges that there is serious doubt whether, if presented to the Commission, the plan would be found to meet the standards prescribed by Congress for the protection of the investors. But no question in the collective

mind of the Commission can give rise to a justiciable controversy, nor may its pronouncements, policy, or program, save as they have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of others, for the judicial power does not extend to the determination of abstract questions. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324.

The Commission argues that because of the extraordinary complexity of the programs dealt with, and the fact that the holding company device has become so largely a mechanism for circumventing legal restraints, it is especially important that the Act be given a broad and flexible construction; that in view of the public purpose to be served, it would seriously impair or limit its accomplishment if the presently sought remedy were withheld, and that there must be an inter-play of functions on the part of both agencies and courts, in preventing the Act from being circumvented or evaded by methods which could not be foreseen and specially provided for. Undoubtedly these broad aspects of the matter must weigh heavily with courts of equity, but while courts have upon occasion bridged gaps in the law by construction when compelled by clearly expressed legislative purpose, yet "judicial law-making should always be cautiously employed and should be severely restricted in scope". *New England Coal & Coke Co.* v. *Rutland R. Co.*, 143 Fed. (2d) 179, 189 (C. C. A. 2).

If it be said that a proceeding for reorganization or recapitalization under state law by an exempt corporation may, for all practical purposes, nullify the power of the Commission to exercise its rights and fulfill its duty to revoke the exemption, it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform its capital structure. It may not submit its plan of reorganization to the

Commission because it is not subject to the authority of the Commission, and its exemption may have value to it or to new investors which neither its directors nor stockholders may be willing to surrender. It may not, except at its peril, resort to the remedial provisions of state law, for if it does the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation without regard to the exigency nor to the effort and expense that may have been expended in formulation. We cannot but conclude that the Congress, either deliberately or by indirection, left unoccupied an area of supervision and control by the Commission. It is neither a novel nor unexpected result. In the difficult task of framing legislation to reach newly sensed evils in a complicated social, economic, and financial organization, the finite intelligence of the Congress may not always foresee all of the situations that may arise which call for supervision and regulation. The classical illustration derives from our endless succession of tax laws, and the distinction which the courts have drawn between tax evasion and tax avoidance. For the former the law provides its own discipline —for the latter, resort must again be had to the Congress.

The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so requests such further stay as may be necessary in that connection. We consider the problem here resolved not free from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in *Virginia Ry.* v. *U. S.*, 272 U. S. 658, 672, *et seq.* The presently operative restraining order will be continued until mandate shall have issued.

The order below is affirmed.

HUTCHESON, *Circuit Judge*, Concurring Specially:

I concur in all that is said in Judge Simons' excellent opinion. I think, though, that the short and simple answer to appellant's claim of jurisdiction is to be found in the fact that Section 25[1] of the Public Utility Holding Company Act, which defines the jurisdiction of the federal courts with respect to suits brought by the commission does not grant jurisdiction of a suit of this kind. I write this brief concurrence to say so. I think it may not be doubted that this section and Sections 11(d)(e)(f) and 18(d)(f), which state the circumstances and the manner in which the commission can apply to the courts for relief, were intended to be, and are, as to jurisdiction, both inclusive and exclusive. A word by word examination of

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[1] Section 25 provides:

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a court of appeals for the District of Columbia', approved February 9, 1893 (D. C. Code, Title 18, Sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

these sections makes it clear that nothing in them authorizes the suit here brought. Indeed, the commission in its brief disclaims them as the jurisdictional basis of the suit. In my view, this disclaimer, in the light of the settled rule of law that a statutory scheme intended to be all inclusive must be treated as exclusive also, settles the controversy against the commission. For it is of the essence of such a scheme that what is not included is excluded.[2] The commission, therefore, in asserting a roving commission to sue for, or as, the United States, *In Re: Debs*, 158 U. S. 564, finds itself confronted with the difficulty, inherent in efforts to induce a court of special jurisdiction to embark upon the exercise of jurisdiction, vague in its generality, and general in its vagueness. But this is not all. It finds itself confronted with the one of attempting to sue out of the character with which the law has invested it, of invoking a jurisdiction beyond that to which the statute, by especially defining, has limited it. It seems quite clear to me that unless we are now to abandon in favor of notions completely alien to our system of law, the settled doctrines of federal jurisdiction and of statutory construction prevailing here, we must say: that the commission is the creature of statute; that it lives and moves and has its being by statutory authority alone, and only within statutory confines: that the creature may not say to its creator, "Why hast thou created me thus?"; and that the commission may not, therefore, by any kind of mysterious metempsychosis, become disembodied from, and disenthralled of, the statute which gives it life, to sue not as creature but as creator, in short, as the United States itself. Because then the statute of its creation does not grant, but in effect denies, the jurisdiction invoked, I am in no doubt that the district judge was right and that his judgment should be affirmed.

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[2] *Posey* v. *TVA*, 93 F. (2) 726; *TVA* v. *Kinzer*, 142 F. (2) 833; *Breeding* v. *TVA*, 9 So. (2) 6.

CLARK, *Circuit Judge* (dissenting):

Public Utility Holding Company Act of 1935, §3(a), 15 U. S. C. A. §79c(a), authorizes the Securities and Exchange Commission to exempt certain holding companies of a predominantly intrastate character from the provisions of the Act, "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers"; but under §3(c), it "shall" revoke the exemption whenever, on its own motion or upon application of a company involved, it "finds that the circumstances which gave rise to the issuance of such order no longer exist." This power and duty of revocation was stressed by the S. E. C. in granting exemption to this defendant in 1936.[1] Just as the S. E. C. was about to proceed to a scheduled hearing of petitions for revocation of the exemption, defendant, assuming to proceed under authority of a hesitant decision of the State Public Service Commission, took precipitous action to put into effect a plan of recapitalization which would change the status of the preferred stockholders—the very matter at issue in the proceedings pending before the S. E. C. That this action, if not restrained, would indubitably scramble the interests of the stockholders,

[1] Thus, after citing the statutory provision, §3(c) *supra*, it appropriately said: "The provisions of Section 1(c) and 3(d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing." 1 S. E. C. 345, 346, 1936. Inequitable distribution of voting power was held by the Commission to be a ground for refusing exemption under this section in *In re Niagara Hudson Power Corporation.* Holding Co. Act of 1935, Release No. 5115, June 20, 1944; *cf. Ecker* v. *Western Pac. R. R. Corp.*, 318 U. S. 448, 474; *Okin* v. *S. E. C.*, 2 Cir., 145 F. 2d 913. In the present case the Commission was also acting under §2(a)(7)(B), petitions under the two sections being consolidated for a single hearing.

perhaps beyond recall, is obvious; that it is the duty of the S. E. C., upon a finding that the conditions rather strongly indicated *prima facie* do exist, to attempt to unscramble them notwithstanding any obstacles placed in its way seems equally obvious. This duty is certainly not made less insistent by the Supreme Court's solicitude for the observance of security priorities under this Act, shown once again in *Otis & Co.* v. *S. E. C.*, S. Ct., Jan. 29, 1945. Nor, indeed, is it lessened by the constitutional overtones apparent in that decision and already introduced into this case by the contention of the preferred stockholders before the State Commission, which that Commission did not attempt to resolve.

Hence the need of the preventive protection of equity is great; such scrambling and unscrambling of securities can do hardly any one any real good and may do innocent investors, lacking inside knowledge, quite grievous harm. In fact, the only ones who may gain from the company's actions, outside of those frankly speculating or betting on the outcome, are seemingly the management and the common stockholders, who alone can vote and for whom the management is acting. But these, too, can profit only to the extent that presenting a *fait accompli* to the S. E. C. may discourage that body from further activity. Its past record of assiduity in protecting the public interest suggests that even the hope of such a consequence may be in vain.

My brothers' opinion tends to give the picture of an orderly proceeding under state supervision rudely interrupted by the attempted interference of a federal agency to vindicate in an academic way a power which it has not invoked and may never wish to utilize. Since the issue below was strictly limited to one of power and jurisdiction alone and the S. E. C. with great circumspection has attempted to avoid prejudging the issues which may later come before it, the weight of the case against the defendant is perhaps unimportant at this stage of the proceed-

ings. But denial of relief has been rested to a considerable extent upon what is concluded to be the vagrant nature of the federal interest herein. Hence I deem it necessary to emphasize how differently this matter appeared to the State Commission itself than as here stated. That Commission's criticism of the defendant for voting huge dividends to the common stockholders in the past and for denying representation to the preferred stockholders, notwithstanding that their dividends were greatly in arrears, its regret at its own lack of power to rectify the situation, and its final vote of only three in favor of what appears hardly more than a washing of its hands of the matter, over the protest of its able chairman and another commissioner deploring action while matters were "in a crucial stage before the Securities and Exchange Commission," amount to an excoriation of the officers and management which I should have thought they would have wished to show undeserved at the earliest opportunity possible. And certainly no better forum could have been offered them than that of the scheduled hearing before the S. E. C. The support which defendant appears to draw from the State Commission's action seems somewhat odd; for that action is almost a direct invitation or appeal to the S. E. C. to afford the relief the State agency cannot.[2]

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[2] On July 27, 1944, the Commission through Chairman Maltbie rendered an opinion with these significant passages (quoted in the complaint herein):

> "It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?
>
> "The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has

[Footnote continued on following page.]

Again the opinion stresses the difficulty under which an exempted company must operate if it must fear the renewed control of the S. E. C. at any time. I cannot avoid the feeling that practically this is an exaggeration of conditions; in daily life milk producers still seem to operate, notwithstanding numerous city health requirements, we all survive various traffic, police, and other regulations, and light and power companies and their holding parents and grandparents are yet operating, in spite of the ministrations of the S. E. C. But the point is that these provisions are announced by the Congress as a part of a general plan of what it considers wise pub-

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[Footnote continued from preceding page.]

dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944 for at least eleven sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration, for the preferred stockholders as they purport to have now, the company could have avoided the nonpayment of preferred dividends for six years."

Another opinion, dated October 17, 1944, and adopted December 14, 1944, with Chairman Maltbie and Commissioner Burritt not voting for the reasons stated in the text, went into the "Inadequate Participation by Preferred Stockholders," the limited steps taken to meet the problem, and the question raised whether it would be better to abandon the plan altogether or accept what

[Footnote continued on following page.]

lic policy; and we cannot eliminate them, even if we would like to do so. Whatever this court does, indeed whatever may be the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide—if necessary, in a new proceeding and under another section of the statute—will still exist. There are questions here involved too important not to survive a mere ruling of the court's lack of jurisdiction to interfere at a primary stage of the dispute. In fact, one wonders whether defendant is well advised in seeking to shut off an early adjudication of these important issues, in view of what would seem the well-nigh inevitable consequence of rendering its new securities largely unmarketable during the period of uncertainty.[3]

[Footnote continued from preceding page.]

was proposed. In deciding upon the latter it said that the proposed plan was a step in the right direction from the standpoint of the consumer and that it did place the company's financial structure upon a more stable basis. Continuing it said: "However, from the standpoint of preferred stockholders, the plan leaves much to be desired. But the Legislature has not given this Commission the power to formulate a new plan or to engraft changes upon the proposed plan and to compel the company to accept the changes. All that we are authorized to do is to approve or to reject the plan proposed by the company. The Legislature has provided a remedy for any stockholder who is dissatisfied with the plan. He may seek an appraisal of his stock and obtain the appraised value thereof upon compliance with the conditions specified in §§21 and 38 of the Stock Corporation Law." Obviously this latter remedy is not appropriate to restore or protect the value which the plan has already threatened to destroy.

[3] In the light of this situation, resulting from the provisions of the federal state itself, the memorandum of the New York Curb Exchange as *amicus curiae*, suggesting, and apparently objecting, that "the stockholders are in effect frozen and this condition will continue so long as the injunction is in effect," seems surprising. The Exchange ought hardly to take sides in a dispute between classes of investors. But in any event, the Exchange would seem to have some obligation to warn traders of the defects attaching to the new stock even if and when it becomes unfrozen.

In view, therefore, of the undoubted need of a remedy, I think we should direct our attention to possible ways and means to that end, rather than confine ourselves to discovering objections to the method which the S. E. C. has determined upon. After all, we are agreed upon the need of a temporary stay; the District Court is not very far distant from the offices of the S. E. C. in Philadelphia; and a group of preferred stockholders is already before us as *amicus curiae* and obviously ready for greater participation if justified in law. I do not think it would be difficult for my brothers—upon finding doubts I do not share as to the procedure actually followed—to find and state a procedure which will accomplish whatever is necessary. And I conceive it a court's duty to do so, particularly in view of the patent admonition of Congress to that effect, in the first section of the Act, where is set forth at length the evils which gave rise to this legislation[4] and the broad public policy intended to be subserved by it. The legislators wisely knew that they could not foresee all the holes which astute counsel might discover in legislation so far-reaching; and so with foresight they stated a broad policy to guide courts in their approach to statutory interpretation. Certainly they could hardly have forseen a lacuna destructive of the very purposes of specific sections of the Act and resting merely upon the

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[4] One of these was the squeezing out of preferred investors. See Sen. Rep. No. 621, 74th Cong., 1st Sess., 1935, 26, 58; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 1935, 12; S. E. C. Report on Protective and Reorganization Committees, Part VII, 109-187; Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act*, 57 Harv. L. Rev. 295; Dodd, *Fair and Equitable Recapitalizations*, 55 Harv. L. Rev. 780, 796-806, 816; Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination*, 29 Va. L. Rev. 1, 27-39; *Otis & Co.* v. *S. E. C.*, S. Ct., Jan. 29, 1945, *supra*.

celerity with which a company acts when faced with a call for a hearing before the S. E. C.[5]

Moreover, this very approach was followed in *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, which reversed this court's conclusion, *In re U. S. Realty & Improvement Co.*, 2 Cir., 108 F. 2d 794, that nothing could be done about a more serious gap in the Chandler Act dealing with corporate reorganizations. Now, after the event, we seem inclined to discover grounds showing that result predestined and easily distinguishable from our present case. Actually, however, the problem of interpretation there was initially much more difficult than the one here. For there, unlike our case, the fundamental jurisdiction of the S. E. C. to act at all was most doubtful, and there appeared to be also positive prohibitions against the S. E. C.'s right even to raise the question. The Chandler Act, in providing for corporate reorganizations under Chapter X and for arrangements under Chapter XI, had set forth overlapping and in part conflicting provisions without any definite suggestion for their reconciliation. Accordingly the Realty Company sought the protection of Chapter XI (wherein the S. E. C. had no rights or duties of any kind), and nothing in express terms negatived its right so to proceed. This initial question of bankruptcy jurisdiction under the statute was the one which proved most difficult throughout the proceedings; out of a total of twelve judges who heard the case at different stages, six were of the view that the company's right to petition only for an arrangement could not be denied. The eventual denial of that right had

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[5] Defendant stresses the need of speedy action under the order of the State Commission and points to the provision in the order that it shall report its acceptance within 30 days after service of the order. But that certainly did not require action the next day and three days before the date of the S. E. C. hearing. Moreover, even if the acceptance required was other than formal, and called for immediate execution of the plan, the Commission, which had been delaying action to secure better results, would obviously have granted more time upon request for cause shown.

to rest, therefore, upon an interpretation of the purposes of the Chandler Act and an exposition of how these would be frustrated by the contrary holding. As to the S. E. C., its only standing, by the terms of the statute itself, was to report upon a plan in a Chapter X proceeding, under certain conditions and with a right of intervention in such a proceeding, but with an express prohibition against appeal, §208, 11 U. S. C. A. §608, which suggested a lack of status beyond the limited one expressed. The District Court, however, had allowed the S. E. C. to intervene to protect the public interest involved; and while this part of the court's judgment was reversed by this court, 108 F. 2d 794, 797-799, it was approved by the Supreme Court as a discretionary ruling under F. R. C. P. 24(b), thus establishing the standing of the S. E. C. to litigate in support of its public responsibilities.[6]

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[6] The opinion suggests that recognition of the S. E. C.'s right to intervene under F. R. C. P. 24 does not support its right to sue directly. It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486, as follows: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it.*" (Italics added.) So the reference in the *U. S. Realty* case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See *Commercial Cable Staffs' Ass'n* v. *Lehman*, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, *Nature of Permissive Intervention under Rule 24b*, 3 Fed. Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 Yale L. J. 65.

In our present case the jurisdiction of the S. E. C. to act eventually on the issues presented to it for hearing is beyond dispute under the statute itself; and its duty to appear as a litigant to enforce its orders—eventually—is likewise clear under §18(f), and *cf.* §§11(d)-(f), 25. The real issue, as developed in the opinion herewith, is whether or not this action is premature. (Of course, as a practical matter, action must be taken now to be really effective.) This is demonstrated by the emphasis in the opinion upon an existing jurisdiction of the court as ground for distinguishing cases such as *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. P. R. Co.*, 294 U. S. 648, *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, and *Craselli Chemical Co.* v. *Aetna Explosives Co.*, 2 Cir., 252 F. 456. But for my part these cases are authority for the S. E. C. here because its jurisdiction, given it by statute, is being exercised to the fullest extent that is *presently* appropriate. It has taken jurisdiction of the petitions and ordered a hearing with notice, just as it had committed itself to do on its original grant of exemption. And its jurisdiction, thus properly accepted, is now being flouted as drectly as was federal power in the cited cases, or in *S. E. C.* v. *U. S. Realty & Improvement Co., supra,* where, as we have seen, jurisdiction for the S. E. C. was much more difficult to discover, or in *In re Debs*, 158 U. S. 564, which was a still broader assertion of federal power and duty. [7] It seems to me that this case is an appropriate vehicle for vindication of an important

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[7] *Board of Railroad Commissioners of North Dakota* v. *Great Northern Ry. Co.*, 281 U. S. 412, so far as it goes is also a direct authority. There it was held that intrastate railroad rates established by a state commission would not be set aside because of the pendency of proceedings before the Interstate Commerce Commission *at the suit of the carriers.* The Court says significantly, 281 U. S. at page 430: "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

federal right, brought in the proper federal court within the express language of general federal jurisdiction, 28 U. S. C. A. §41(1).[8]

But there seems to be a thought that the S. E. C. should first have taken some affirmative action which it could then ask the court to enforce under §18(f) of the Act. The reasons why the S. E. C. did not itself pass an order of injunction and then ask its enforecement are, as it states, that it wished to proceed with due circumspection and without prejudgment of the case. Further analysis, I believe, will show that it has done all it should properly have done at this stage of the proceedings. It could hardly issue anything like a permanent injunction without due notice and a hearing; this, or its full equivalent, it was proceeding to consider at the appropriate time, and it should be protected against the prejudice to its proper adjudication of the issues which is offered by the hasty action of the respondent in those proceedings before it. If, on the other hand, it should have issued some formal order of temporary restraint—without full hearing, for which time was lacking—mail service from Philadelphia is only overnight and such order can reach the District

[8] As the S. E. C. urges, it seems an overrefinement, suggesting an unnecessary limitation upon the general broad power of federal courts to protect federal jurisdiction as established by Congress, to place jurisdiction here entirely upon the terms of a single specific statutory enactment and thus circumscribe it by what is there expressed. It seems to me that the S. E. C. should be held entitled to sue here as an officer of the United States enforcing a public right under the laws of the United States. But if it is necessary to look to new grants of power, I suggest that §§18 (f) and 25 of the Act do chart the course, and that it is not sufficient to say that they apply only after definite orders of the S. E. C. and for violations thereof. As developed later in the text, it would seem that what the S. E. C. did amounted in substance to a determination that temporary restraint was in order. And rights and duties under the Act were, therefore, definitely threatened, so as to make these statutes applicable if a limited source of jurisdiction is considered thus requisite. Moreover, if there is doubt whether or not the necessary formalities have been completed by the S. E. C., the case should be held, as stated below, until we are sure they have been completed.

Court long before our mandate goes down. But in reality what will that add to the steps already taken by the Commission in first ordering a hearing and later in directing its General Solicitor to institute this action and press it for the safeguarding of the hearing as ordered? I assume we are not prepared to question the authorization of the Solicitor to act in the premises; if we are, the order of authorization will hardly be slow in arriving. All these seem to me only formalities, easily satisfied if not already completed, to justify the position of the S. E. C.; if it can come to the federal courts after a hearing on December 19 to protect its jurisdiction, it should be entitled to come to us before that date to protect a threat against the fairness of its hearing to determine the exercise of that jurisdiction, and the prejudice resulting from a coup d'etat by the corporation most involved.

Finally, if, notwithstanding these years of operation and the numerous court proceedings where it actually has been heard in protection of the public interest, the S. E. C. is found to have not only no duty, but no right, to act in the present situation, then it seems to me the preferred stockholders who are directly threatened with injury have a clear right to ask the court for relief. I should hold that they had such right under the implications of the Act itself, just as has been held with respect to other acts administered by the S. E. C., *Baird* v. *Franklin*, 2 Cir., 141 F. 2d 238, 244, 245, certiorari denied 65 S. Ct. 38; *Charles Hughes & Co.* v. *S. E. C.*, 2 Cir., 139 F. 2d 434, 437, 438, certiorari denied 64 S. Ct. 781; *Goldstein* v. *Groesbeck*, 2 Cir., 142 F. 2d 422, 427, certiorari denied *Groesbeck* v. *Goldstein*, 65 S. Ct. 36; but even if they must show diverse citizenship, as well as a federal right, there are undoubtedly persons who can fulfill all such requirements among the group appearing before us as *amicus curiae*. At least the case should be held below to give them the opportunity to appear as plaintiffs. *Cf. Hackner* v. *Guaranty Trust Co. of New York*, 2 Cir., 117 F. 2d 95, 98, certiorari denied 313 U. S. 559.

(Opinion of District Court.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

CIVIL ACTION, INDEX NO. 4606.

[SAME TITLE.]

Brooklyn, New York
December 21st, 1944

KENNEDY, *D. J.*

The plaintiff, Securities and Exchange Commission, applies for a temporary injunction restraining the defendant, its agents, servants and employees from "directly or indirectly consummating or carrying out, or taking any action or steps to consummate or carry out or effectuate" a certain plan of reorganization readjusting the rights of its preferred and common stockholders.

The prayer for relief plainly states that the temporary injunction sought here and the final injunction sought in the action are identical.

The plaintiff, which was created by Section 4 of the Securities and Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15, U. S. C., Section 78, *et seq.*) is charged with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, *et seq.*).

On November 7, 1935, the Long Island Lighting Company, the defendant here, applied to the plaintiff under Section 3 (a) (1) for exemption from the act. On March 27, 1936 the Commission granted such exemption, reserving, however, in its findings and opinion the right to

amend its order if it should find that the exemption is detrimental to the public interest because of the defendant's activity, or that of any subsidiary company, or because a burden was placed upon interstate commerce.

The motion is based upon the complaint, and the complaint alone, and although the defendant appeared by attorney, it submitted no papers in opposition.

However, extended argument was had, and counsel supplied me with a number of facts not in dispute which underlie the application.

The preferred stock of the company has never had voting rights. Arrears have been piling up on this preferred stock, and since March 27, 1936, the date when the defendant was exempted from the provisions of the Public Utility Holding Company Act these arrears aggregate more than ten million dollars (Complaint p. 4).

Evidently there has been desire on the part of everybody to make some adjustment in the corporate structure.

On February 29, 1944, the defendant submitted to the Public Service Commission of the State of New York a plan of readjustment, which, on April 25, 1944, its stockholders approved. This plan apparently was never acceptable to some of the preferred stockholders, who undoubtedly, in view of the increasing arrears, desired much greater control than the common stockholders were willing to give them. On July 27, 1944, the Public Service Commission of the State of New York acknowledged that it was helpless to compel the company to readjust its voting rights in accord with what could be considered "sound finance and equitable considerations" (Complaint p. 7).

Nevertheless the defendant continued its effort to secure approval of this plan from the Public Service Commission. Thereupon, and on November 4, 1944, a protective committee of preferred stockholders applied to the plaintiff. This committee asked that proceedings under Section 3 (a) of the Act be reopened, and on November

10, 1944, the Commission directed that a hearing be held to determine whether the exemption of the defendant was detrimental to the public interest and whether its order of March 27, 1936 should be revoked or amended (Complaint p. 4). Still later, and on November 21, 1944, the plaintiff on its own motion instituted a proceeding under Section 2 (a) (VII) (B) of the Act to determine whether certain persons and corporations exert a controlling influence on the policy of the defendant, and whether they should not be subject to the obligations of the statute. On November 22, 1944, the two proceedings then pending were consolidated and a hearing ordered on November 27, 1944. This hearing was adjourned (not on the application of the defendant) to December 19, 1944.

In the meantime, and on December 14, 1944, the Public Service Commission of the State of New York approved the plan of reorganization, and an order effectuating the plan was filed on December 16, 1944. It was conceded on the argument by the plaintiff's attorneys that on the date last mentioned the rights of the stockholders under the corporate structure theretofore existing came to an end under New York State law. The attorney for the New York Curb Exchange, appearing specially at the argument, stated to the court that trading in the old securities ceased on December 16, 1944 and transactions in the company's stock as modified by the reorganization commenced on December 18, 1944. In the early afternoon of December 19, 1944 there was submitted to me for signature an order to show cause containing an *ex parte* restraining clause as broad as the prayer for relief in the complaint itself. The motion was returnable on December 20, 1944. As will more fully appear later I had doubts about my power to grant even a temporary restraining order to the plaintiff. Nevertheless I did so.

From the argument of counsel for the plaintiff I conclude that specific jurisdiction to grant the injunction sought by the motion is not to be found in the act itself.

Certainly the defendant had violated no order, rule or regulation of the plaintiff; during all the times mentioned it was specifically exempt from the jurisdiction of the Commission. Defendant's proceedings in the Public Service Commission were taken openly, and apparently in full compliance with the law of the State of New York and of the administrative body to whose jurisdiction it was subject, namely the Public Service Commission. These proceedings, as indicated, stretched over the period between February 29, 1944 and terminated on December 16, 1944. Nor did the defendant, so far as either the complaint or the argument discloses, flout or ignore any order of the plaintiff with respect to the hearing ordered under Section 3 (a), or 2 (a) (VII) (B) of the act. No such claim was made. The plaintiff urges, however, that during the period between the final hearings in the Public Service Commission (September 27, 1944) and the final approval of the plan (December 14, 1944) the defendant was on notice that proceedings to revoke its exemption had been set in motion. Plaintiff says that these proceedings might result ultimately in bringing the defendant within the jurisdiction of the Commission, and that if this happened the Commission might not approve the reorganization plan. Meanwhile, says the plaintiff, security holders will proceed with exchanges under the reorganization plan "without disclosure of the fact that proceedings under the Act may require a radically different plan" (Complaint p. 13). This in turn may result in confusion to security holders as well as substantial difficulties to the Commission in the discharge of its duties.

The defendant, among other contentions, urges that to grant even a temporary restraining order here would be to subject the defendant to intolerable difficulty. It has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can

revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote.

If, as I have indicated, there is no specific statutory authority for the kind of order which the plaintiff seeks (and perhaps even if there were) it would be incumbent upon the plaintiff under general principles of equity to show that irreparable harm would result from the denial of the temporary injunction, and I use "would" in the sense that more than a bare possibility exists. I cannot say that such a showing has been made. Moreover the plaintiff, without specific statutory authority, is asking that on the bare complaint itself I should determine that it is entitled to all of the final relief which it seeks. Plaintiff's counsel admitted on the argument that in the case at bar there was no distinction between a temporary injunction and a permanent injunction, and I agree that this is so.

Leaving all other considerations out of the matter I doubt seriously that I have any such power as that which the plaintiff invokes.

I think plaintiff is really seeking a decision that the courts may, in aid of the statute (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, *et seq.*) restrain corporations not within plaintiff's jurisdiction against the commission of acts that plaintiff could deal with itself, were it later to acquire jurisdiction. Concededly this power has not been conferred upon the courts in terms by the Congress where it would most naturally be looked for, namely, in the statute itself. On the argument plaintiff's counsel seemed to urge that their cause was justiciable, and the relief sought should be granted under general principles of fair dealing—of equity. It is true that federal courts have general equity powers, but only when sitting in cases otherwise within their jurisdiction as defined by Congress (*Briggs* v.

United Shoe Machinery Co., 1915, 239 U. S. 48, 36 S. Ct. 6, 60 L. ed. 138). And so if plaintiff would set the court in motion on principles of equity it must first bring the cause within some of the familiar fields of jurisdiction granted to the courts by the Congress, such as diversity or the existence of a federal question.

I doubt that there could be any diversity here, and certainly it is not plainly set forth in the bill of complaint. Is there a federal question? If so it must lie in the suggestion that plaintiff, a federal agency, seeks to protect itself against acts which might hamper it in the execution of its duty to enforce the statute (Complaint p. 13). But I believe no federal question arises unless plaintiff's right of action may be said really and substantially to involve a controversy respecting the *validity* or *construction* of an act of Congress (*Shulthis* v. *McDougall*, 1912, 225 U. S. 561, 569; 32 S. Ct. 704, 706, 56 L. ed. 1205). The bill of complaint here does not disclose that any such controversy exists. Nor was it suggested in the argument that such a controversy exists, and that the granting or withholding of an injunction, either temporary or permanent, would really turn upon the construction or validity of the statute from which plaintiff derives its powers, or for that matter of any other federal enactment.

This reduces the issue to one that is comparatively narrow: under the guise of construing the statute to determine whether the power invoked by the plaintiff may be implied may I take jurisdiction, and then either exercise that power or not, depending upon which way the appeal to discretion lies? It seems to me that if I answer this question in the affirmative, and that if the courts under the guise of construing a statute can *give* themselves such sweeping power, then they and not Congress are defining jurisdiction. I cannot believe that this sort of "construction" (no matter how salutary the statute, or for that matter how great the specific benefit

achieved by a decision in favor of the existence of such power), can take the place of a real controversy over what Congress meant by the words it employed in the statute. This is more like deciding what Congress meant by silence. When appeal is made to general principles of fair dealing and of equity it is understandable that federal courts have at times been unwilling to renounce jurisdiction, and may have done so reluctantly; but as I understand the matter they must. And I do so, without touching questions like the wisdom or fairness of the plan of reorganization here assailed.

Nor do I consider the other questions that it would be necessary to decide in plaintiff's favor in order that the relief it asks might be granted. It was strongly urged that there is no clear showing of irreparable harm here if injunction be withheld; that the plan, having been consummated, cannot be undone, nor its execution halted without creating a chaotic condition in defendant's corporate structure; that the plan was *sub judice* in the administrative authority of the state for eight months before the preferred stockholders invoked plaintiff's protection, and almost four months after the Public Service Commission had in terms suggested this course to them (Complaint p. 7). Moreover it does not clearly appear whether these preferred stockholders have a remedy in the state courts to review the action of the Public Service Commission—a remedy that they failed to invoke. I acknowledge that this last consideration, the effect of failure to exhaust a possible remedy in tribunals of the state, is not to be charged to plaintiff. But the preferred stockholders appeared on this motion before me and were heard. It was they who set in motion at least a portion of the consolidated proceedings looking to the recapture of jurisdiction by the plaintiff. And were the merits before me I would think it proper to consider whether a temporary injunction here might do

violence not only to principles of equity, but to principles of comity also.

It is the power to speak on these matters that I renounce. One consideration remains. I intimated to counsel at the argument that I inclined to hold the views which I here express on the question of power. Indeed I adjourned the argument for several hours after indicating this, in the hope that counsels' research or mine would bring to light some controlling authority on the jurisdictional point. None was found. Counsel for plaintiff, in line with their duty, and no doubt appreciating that the want of a clear precedent injured their own cause, requested that I continue in force the broad *ex parte* restraining order, while review of any adverse ruling was secured. Since I have reached the conclusion that I am without power to grant the relief which plaintiff asks, and therefore should not have restrained defendant at all, I feel that this course would not be proper even though precedent seems to indicate that I might be justified in following it (*Merrimac River Savings Bank* v. *Clay Center*, 219 U. S. 527, 55 L. ed. 320; Moscowitz, *D. J.*, in *Matter of Realty Associates Securities Corporation, Debtor*, No. 45,024, E. D. N. Y., December 1, 1944). I suggested instead to counsel that the length and character of any temporary *ex parte* restraint could with greater propriety be determined by the reviewing Court.

Motion denied, temporary stay vacated, submit order.

HAROLD M. KENNEDY,
United States District Judge,
Eastern District of New York.

APPENDIX B.

(Affidavit in Opposition to Motion for Extension of Temporary Restraining Order.)

IN THE

SUPREME COURT OF THE UNITED STATES.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

LONG ISLAND LIGHTING COMPANY,

Defendant.

State of New York,
County of New York—ss.:

HAROLD R. MEDINA, being duly sworn, deposes and says:

I am of counsel for Long Island Lighting Company in this proceeding.

The Company opposed plaintiff's application to continue the stay contained in the order to show cause by which these proceedings were commenced on December 19th, 1944 in the United States District Court; it opposed plaintiff's application to one of the judges of the Circuit Court of Appeals for the Second Circuit for a stay pending the determination of the appeal therein; it opposed plaintiff's application to said Circuit Court for a stay until final disposition of this case by this Court upon petition for writ of certiorari or until the determination of an application for a temporary injunction during the pendency of said writ of certiorari before this Court; it now opposes the present application to

continue the existing restraining order pending application to this Court for a writ of certiorari.

This is an action in which the sole relief sought by plaintiff is in substance the relief which plaintiff obtained in the beginning, still enjoys by virtue of the order of the Circuit Court, and will continue to profit by should the present application be granted. This granting from the beginning of this suit of the full relief prayed for by way of final judgment exists at the present time and will, if presently extended, continue to exist not only despite the most diligent and consistent protests by defendant that the United States District Court was wholly without jurisdiction to grant any relief, but despite the decision of the United States District Court and of the Circuit Court of Appeals that plaintiff was without power to seek, and the United States District Court without jurisdiction to grant, any part of the relief which plaintiff has thus, by the expedient of a succession of temporary restraing orders, obtained.

It is absolutely clear, as two courts have now found, that the Securities and Exchange Commission lacks the power to apply to the courts for the relief requested in this proceeding and that the courts are without jurisdiction to grant it. The power of the Commission to apply to the courts for relief with respect to its function under the Public Utility Holding Company Act, and the power of the courts to grant it relief, are fully and exhaustively set forth in that Act. The Commission finds no foundation for this suit in these plenary provisions. As Judge Hutcheson states in his opinion, "Indeed, the Commission in its brief disclaims them as the jurisdictional basis of the suit." As Judge Hutcheson concluded, and as defendant has contended throughout this proceeding, this disclaimer "settles the controversy against the commission". It takes no more than a reading of the jurisdictional provisions of the Act to determine that this suit is utterly without foundation.

The Commission, disclaiming the right to bring this suit under any authority to be found in the Public Utility Holding Company Act, relies upon the general equity powers of a Federal Court. The Circuit Court considered this contention at great length; it not only considered the cases cited by plaintiff in support of its position but also did its own independent research in an attempt to find precedent for the use of powers which the plaintiff claimed it had. It found no such precedent, stating, "No case has been cited to us, and none has been found, where a Federal Court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise."

After plaintiff's contentions have thus been so thoroughly considered and found wanting in merit it would be a grievous injustice to the defendant to continue the restraining order which every court that has considered the matter has concluded it was without jurisdiction to grant.

The restraining order has been extremely prejudicial to Long Island in the conduct of its business and if continued may well prove disastrous to it.

Long Island is a gas and electric company incorporated under the *Transportation Corporations Law* of the State of New York. It has at all times been subject to the jurisdiction of the Public Service Commission of the State of New York. It has never been subject to the jurisdiction of the Securities and Exchange Commission and was expressly exempted from the provisions of the Public Utility Holding Company Act by order of that Commission dated March 27, 1936.

All that Long Island has done with respect to its plan of recapitalization has been done in accordance with the orders of the Public Service Commission and the laws of the State of New York. Proceedings before the Public

Service Commission on the plan of recapitalization were instituted long before Long Island had any notice that the Securities and Exchange Commission was interested in reconsidering its order exempting Long Island from the provisions of the Act.

In the ordinary course of its procedure, and after extensive public hearings held during the months of March through September, 1944, the Public Service Commission on December 14, 1944 issued an order approving the plan. On December 16, 1944, Long Island, in accordance with Section 36 of the New York *Stock Corporation Law*, filed the certificate of recapitalization, together with the order of the Public Service Commission approving the same, in the office of the Secretary of the State of New York.

According to the law of New York, the plan became effective on such filing (*General Corporation Law*, §8), and it is conceded that the rights of stockholders under the corporate structure theretofore existing came to an end.

Long Island's plan of recapitalization is presently in effect; the old securities and all rights thereunder are gone. Thus the only effect of the restraining order, expressly enjoining Long Island from making any request for the surrender of certificates representing outstanding shares of capital stock, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, is to create untold confusion and uncertainty in Long Island's affairs.

I need not dwell on the dire consequences to Long Island flowing from the fact that it has, by virtue of the restraining order, no stockholders with whom it can safely treat. It can, therefore, do none of the things which by the law of New York require the consent of stockholders.

According to its by-laws, Long Island, after previous notice, must hold its annual stockholders meeting on April 17, 1945, at which stockholders of record on April 7, 1945

are entitled to vote. Long Island, because of the restraining order, has no such stockholders.

A further difficulty, of a most serious character, is that a continuance of this stay will result in a default under the trust indentures securing Long Island's bonded indebtedness.

By Section 3.15 (c) of the trust indenture securing its $10,000,000 3¾% Sinking Fund Debentures, Long Island covenants as follows:

> "(c) Not later than 90 days after the expiration of each fiscal year (which, until the Company shall otherwise notify the Trustee, shall be deemed to be the calendar year), the Company will deliver to the Trustee a statement of income, profit and loss and surplus accounts of the Company for such fiscal year and a balance sheet of the Company as of the last day of such fiscal year. Such statements and balance sheets shall set forth in reasonable detail the results of operations and the financial condition of the Company and shall be certified by an independent firm of certified public accountants satisfactory to the Trustee; the certificate of such certified public accountants to state that in making the audit necessary to such certification they have obtained no knowledge of any default by the Company in any of the terms, provisions or conditions of *Sections 3.07 to 3.14*, both inclusive, of this *Article Third* or, if they shall have obtained knowledge of any such default, they shall disclose in their certificate the default and the nature thereof."

December 31, 1944, was the end of Long Island's fiscal year, so that the time within which to meet the conditions of the trust indenture above quoted will expire on March 31, 1945. After March 31, 1945, should this re-

straining order be continued, Long Island will be in default under its trust indenture and the publicity attendant upon such an event cannot fail to have a gravely prejudicial effect upon the company. It is obvious that Long Island cannot, because of the restraining order, comply with its covenant. Because the restraining order enjoins Long Island from taking any steps directly or indirectly to consummate or carry out its plan of reorganization, Long Island has been unable to change its books and accounts to show the new capitalization. But the new capitalization is the only capitalization, and no firm of certified public accountants, with knowledge of Long Island's capitalization as it appears in the office of the Secretary of State for the State of New York, would certify a balance sheet showing the old capitalization.

Practically an identical problem is presented as concerns Long Island's First Mortgage Bonds under Article III, Section 18, of the trust indenture securing these bonds.

Whereas the temporary restraining order, outstanding though there has been declared no jurisdiction to issue it, is creating havoc with Long Island's affairs, the Securities and Exchange Commission will be in no wise injured with respect to its functions under the Public Utility Holding Company Act if this Court denies the present application to extend the restraining order. The Commission has no jurisdiction over Long Island and may well never have such jurisdiction. It will have jurisdiction only if all the following occur: (1) The Commission, finding that the circumstances which gave rise to the order of exemption no longer exist, decides to revoke Long Island's exemption from the Act; and (2) it is held that Long Island is engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and (3) that Long Island is required, because of Section 4 of the Act, to register under Section 5 of the Act. It is Long Island's position that none of these events can occur and that it

will never be subject to the provisions of the Public Utility Holding Company Act. Of course the Commission does not claim that it has or will ever have jurisdiction over Long Island. Its only claim is that of mere possibility.

Passing the question of jurisdiction, the Commission does not claim that, having jurisdiction, it would disapprove of Long Island's capital structure. This is a matter which it could decide only after full hearing, and the question is one upon which it is in no position to comment, it not having done any of the things which the Act requires it to do before formulating an opinion.

Thus, whether the Commission will ever concern itself with Long Island's capital structure, and whether if it did so it would disapprove the present capitalization, are entirely matters of conjecture.

In all of its applications for restraining orders in this proceeding, the Commission has made the contention that but for a restraining order, its possible duties under Section 11 of the Act will be embarrassed if not frustrated. This claim is patently groundless. If and when the Commission revokes Long Island's exemption, the corporate structure which it can examine in a Section 11 proceeding can only be the corporate structure existing at that time. Long Island's old capital structure, the one it had before December 16, 1944, will then be of no more interest to the Commission than the history of any other corporate structure subject to a Section 11 proceeding. The present restraining order does not and cannot have the effect of keeping the old capital structure alive; that was obliterated when Long Island filed its certificate, and the order of the Public Service Commission approving the same, with the Secretary of State for the State of New York at a time when Long Island was subject only to state authority.

If the Securities and Exchange Commission shall, in the future, have jurisdiction to examine Long Island's

corporate structure in a Section 11 proceeding its jurisdiction with respect to that structure will be as complete as the statute provides. It will in nowise be affected by a failure to extend the existing restraining order.

The Commission has also suggested that but for a continuance of the restraining order there may be persons who will deal in the new securities innocently and without actual knowledge of the issues in the present proceedings before the Commission and such new issues as might be the subject of consideration by the Commission under the Public Utility Holding Company Act, in the event of the effective revocation of the order of exemption. This is only to say that any investor who purchases public utility securities takes the risk of subsequent action by the Commission. Certainly the risk is greatest to the innocent investor who purchases securities of public utility companies whose capital structures are already being examined by the Commission. Standard Gas & Electric Company, United Corporation, Electric Bond & Share, Engineers Public Service, are companies whose capital structures are presently being examined in a Section 11 proceeding. Yet securities of these companies are being freely traded on a national securities exchange. Certainly it is not Long Island's purpose to conceal the administrative proceeding being held by the Commission to determine whether Long Island's exemption should be revoked, and the Company has taken every occasion to inform those interested concerning the fact of the proceeding. It will continue to do so. Furthermore, I have noticed that the New York City newspapers, at least, have given substantial publicity to the court proceedings in this matter.

In connection with the claim of the Commission that purchases by investors may complicate the task of the Commission in the event that it should ultimately obtain jurisdiction to inquire into Long Island's capital structure, the Court will also bear in mind that the Commission

itself has admitted that such transactions have already been had in the "over the counter" market. Furthermore, it is obvious that the holders of the old certificates have the undoubted power to assign and transfer their existing interests or any part thereof by common law assignment, and I am informed that such transfers in large amounts have already been made.

The Commission's right to the relief here sought has been thoroughly considered by the District and Circuit Courts and denied without reservation. The decisions of these Courts are sound beyond any possible doubt. To continue in effect the very order which these Courts thus found they had no jurisdiction to grant would be a denial of justice to the defendant, particularly as a continuance of the restraining order will work great hardship on defendant while affording absolutely no advantage of substance to plaintiff.

I respectfully submit that the relief herein prayed for by plaintiff be in all respects denied.

HAROLD R. MEDINA.

Sworn to before me this
17th day of March, 1945.

EUGENIE WHITNEY,
Notary Public.
Kings Co. Clk. No. 243, Reg. No. 337W6.
Certificate filed in
N. Y. Co. Clk. No. 904, Reg. No. 529W6.
Bronx Co. Clk. No. 51, Reg. No. 171W6.
Queens Co. Clk. No. 1098, Reg. No. 236W6.
Commission expires March 30, 1946.

No. 1059. SECURITIES & EXCHANGE COMMISSION *v.* LONG ISLAND LIGHTING CO. Certiorari, 324 U. S. 837, to the Circuit Court of Appeals for the Second Circuit. April 30, 1945. *Per Curiam:* It appearing that the cause has become moot, the judgment of the Circuit Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint. *Solicitor General Fahy, Messrs. Roger S. Foster, David K. Kadane* and *Theodore L. Thau* for petitioner. *Mr.*

*MR. JUSTICE JACKSON took no part in the consideration or decision of the orders announced on May 28th.

MR. JUSTICE ROBERTS took no part in the consideration or decision of the orders announced on June 18th.

For decisions on applications for certiorari, see *post*, pp. 843, 850; rehearing, *post*, p. 891; cases disposed of without consideration by the Court, *post*, p. 891.

Harold R. Medina for respondent. Reported below: 148 F. 2d 252.